SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 302

CORNELIUS VANDERBILT, JR., PETITIONER,

vs.

PATRICIA W. VANDERBILT AND THOMAS F. McCOY, RECEIVER AND SEQUESTRATOR

ON [redacted] WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, NEW YORK COUNTY, AND THE COURT OF APPEALS OF NEW YORK

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SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

PATRICIA W. VANDERBILT, Plaintiff

against

CORNELIUS VANDERBILT, JR., Defendant

DEFENDANT'S NOTICE OF APPEAL—April 1, 1955

Sirs:

Please take notice, that the defendant above named, Cornelius Vanderbilt, Jr., hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from so much of the judgment of this Court, made on March 30, 1955, and entered in the above-entitled action in the office of the Clerk of the County of New York on March 31, 1955, which awards plaintiff maintenance and counsel fees, and which directs the payment of the amounts thereof by the defendant and by the Receiver and Sequestrator in this action; and which awards plaintiff judgment for costs against the defendant in the sum of $375.30, and which directs the payment of the amount thereof by the said Receiver and Sequestrator; and which may permit continued retention, collection and payment out by said Receiver and [fols. 4-6] Sequestrator of defendant's moneys, funds, property and other assets.

Dated, April 1st, 1955.

Yours, etc., Sol A. Rosenblatt, Attorney for Defendant, Office and P. O. Address, 630 Fifth Avenue, Borough of Manhattan, New York 20, N. Y.

To: Monroe J. Winsten, Esq., Attorney for Plaintiff, 320 Broadway, New York, N. Y.

Jeremiah M. Evarts, Esq., Attorney for Thomas McCoy, Receiver and Sequestrator, 20 Pine Street, New York, N. Y., Clerk of the County of New York.

[fol. 7] In the Supreme Court of New York, County of New York, Special Term, Part IX

* * * * * * *

Judgment Appealed From—March 30, 1955

Present: Honorable S. Samuel Di Falco, Justice.

* * * * * * *

This action having been duly brought on by the plaintiff for a judgment in her favor and against the defendant for a separation from the defendant from bed and board forever on the grounds of cruel and inhuman treatment, abandonment and non-support, and also for reasonable provision for the maintenance of the plaintiff out of the assets and income of the defendant; and said action having been commenced on April 21, 1954, by the making of an order for the service of the summons herein upon the defendant by publication, and the summons herein having been duly served upon the defendant herein by publication and otherwise in compliance with the said order for publication, [fol. 8] and proof of such service and compliance with said order having been duly filed herein on June 7, 1954; and on April 21, 1954, an order having been made herein duly appointing Thomas McCoy, Esq., as Receiver and Sequestrator of the property, assets and income of the defendant within the State of New York, and said Receiver and Sequestrator having duly qualified and is still acting as such; and as such he is now in possession of assets, property and income belonging to the defendant herein; and on or about April 30, 1954, the defendant herein having served a notice of special appearance herein by his attorney, Sol A. Rosenblatt, Esq., for the purpose of objecting to the jurisdiction of this Court of the person of the defendant, and of the subject of this action; and thereafter, and on or about July 1, 1954, the defendant having joined issue herein by the service of his answer to the complaint herein, in which answer the defendant stated that he was appearing specially herein by virtue of the order of the Court entered June 16, 1954 pursuant to Section 237-a C. P. A. subd. 3(c) and this cause having duly come on for trial before

me at a Special Term, Part IX of this Court, on the 10th, 11th, 12th, 13th, 14th, 24th and 25th days of January, 1955; and the plaintiff having appeared by Monroe J. Winsten, Esq., her attorney, and the defendant having appeared herein by Sol A. Rosenblatt, Esq., his attorney, and the plaintiff having adduced her proofs and evidence in respect of the allegations of the complaint with respect to cruelty, abandonment and non-support, and the Court not having considered the same in respect of plaintiff's claims for a separation because such claim for separation was barred [fol. 9] by the ex-parte Nevada decree of divorce obtained by defendant against plaintiff, and the Court having considered said proofs and evidence in connection with plaintiff's claim and plaintiff's needs for her maintenance, pursuant to Section 1170-b of the Civil Practice Act, and the Court having rendered and filed its decisions in writing, deciding, among other things, that the plaintiff herein is not entitled to a separation by reason of its finding that a decree of divorce had been previously granted to the defendant herein in an action in which jurisdiction over the person of the plaintiff herein was not obtained, and that such decree in the State of Nevada was entitled to full faith and credit and was a bar to plaintiff's action for a separation; and that notwithstanding such finding, justice requires that the plaintiff herein is entitled to be supported and maintained by the defendant herein pursuant to Section 1170-b of the C. P. A., and due deliberation having been had thereon, it is

Ordered, adjudged and decreed, that a separation is hereby denied to the plaintiff, Patricia W. Vanderbilt, and that by reason of the bar of the Nevada decree in favor of the defendant, plaintiff's complaint for separation is dismissed on the merits, and it is further

Ordered, adjudged and decreed, that the defendant, Cornelius Vanerbilt, Jr., be and he hereby is directed to pay to the plaintiff, Patricia W. Vanderbilt, as and for her maintenance, the sum of Two Hundred and Fifty ($250.00) Dollars, each week from and after the 8th day of June, [fol. 10] 1954, and weekly thereafter, said payments to be made to the plaintiff herein at the office of her attorney, Monroe J. Winsten, Esq., 320 Broadway, New York 7, N. Y., or to such other address as the plaintiff hereafter

may designate in writing by notice mailed to the defendant at his last known place of residence and to the Receiver and Sequestrator herein, and it is further

Ordered, adjudged and decreed, that Thomas McCoy, Esq., as Receiver and Sequestrator herein, be and he hereby is authorized and directed to pay to the plaintiff herein the aforementioned sum of $250.00 per week in accordance with the provisions of this judgment, by payment to the plaintiff herein of a sum equal to the sum of $250.00 multiplied by the number of weeks which shall have elapsed from June 8th, 1954, to the date of the payment of the aforementioned sum by said Receiver and Sequestrator to the plaintiff, and said Receiver and Sequestrator is hereby authorized and directed to pay to the plaintiff the additional sums of $250.00 one week after the date of the aforementioned payment, and the sum of $250.00 weekly thereafter in each and every week, out of the moneys, funds, property and other assets which he, as such Sequestrator and Receiver, has received or may become entitled to receive as such Receiver and Sequestrator herein, and it is further

Ordered, adjudged and decree, that the defendant, Cornelius Vanderbilt, Jr., be and he hereby is directed to pay the sum of $3,500.00 hereby awarded to the plaintiff as and for an additional allowance for counsel fees for services [fol. 11] rendered by her counsel, to and including the date of the entry of this judgment, the said sum of $3,500.00 shall be paid at the office of Monroe J. Winsten, Esq., 320 Broadway, New York, N. Y., and it is further

Ordered, adjudged and decreed, that Thomas McCoy, Esq., as Receiver and Sequestrator herein, be and he hereby is authorized and directed to pay the aforementioned sum of $3,500.00 in accordance with the provisions of this judgment to plaintiff at the office of Monroe J. Winsten, Esq., as attorney for the plaintiff herein, out of the moneys, funds, property and assets which he, as such Receiver and Sequestrator, has received or may become entitled to receive herein as such Receiver and Sequestrator herein, and it is further

Ordered, adjudged and decreed, that the plaintiff, Patricia W. Vanderbilt, do recover from the defendant, Cornelius Vanderbilt, Jr., the sum of $375.30 costs to be taxed

and inserted by the Clerk of this Court, and the said Thomas McCoy, Esq., as Receiver and Sequestrator herein, be and he hereby is authorized and directed to pay the amount of such costs to Monroe J. Winsten, Esq., as attorney for the plaintiff herein, out of the moneys, funds, property and assets, which he, as such Receiver and Sequestrator, has received, or may become entitled to receive herein [fol. 12] as such Receiver and Sequestrator.

Enter

S. S. Di F, J. S. C., Archibald R. Watson, Clerk of the County of New York.

Filed, Mar. 31, 1955, New York, Co. Clerk's Office.

Plaintiff's Address: 138 East 38th St., New York, N. Y.

Defendant's Address: First National Bank Bldg., Reno, Nevada.

* * * * * * *

[fol. 13] IN THE SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, SPECIAL TERM, PART II

* * * * * * *

Present: Hon. William C. Hecht, Jr., Justice.

ORDER OF SEQUESTRATION—April 21, 1954.

Upon reading and filing the summons and complaint herein, duly verified April 5, 1954, and the affidavit of Patricia W. Vanderbilt, sworn to April 16, 1954, the affidavit of Monroe J. Winsten, sworn to April 16, 1954, and the affidavit of Harry Hyman, sworn to April 14, 1954, wherein it appears that this is an action instituted by the plaintiff for a judgment of separation from the defendant on the grounds of cruelty and abandonment and that the defendant is not within the State of New York and cannot be found therein, and it further appearing that the defendant has property within the State of New York,

Now, on motion of Monroe J. Winsten, attorney for the plaintiff herein, it is

Ordered, that the property of the defendant within the State of New York, both real and personal, and both tan- [fol. 14] gible and intangible, be and the same hereby is sequestrated, pursuant to Section 1171-a of the Civil Practice Act, and it is further

Ordered, that Thomas McCoy, Esq., of No. 20 Pine Street, New York C. New York City, be and he hereby is appointed Receiver and Sequestrator herein, pursuant to Section 1171-a of the Civil Practice Act, of the property of the defendant herein, Cornelius Vanderbilt, Jr., within the State of New York, both real and personal, and both tangible and intangible, and of the rents, issues, profits and income therefrom upon his executing and filing with the Clerk of this Court a bond in the sum of $1000.00 with sufficient sureties, conditioned for the faithful discharge of his duties as such Receiver and Sequestrator herein, and said Receiver and Sequestrator is hereby directed and empowered to take possession of the following described interests, property, assets, income, rents, issues and profits, to wit:

(a) The interests of the defendant herein as a beneficiary of a trust or trusts held and administered by the Hanover Bank, of 70 Broadway, New York City, as Trustee, such interests including, but not limited to, the right to receive income, rents, issues and profits and the right to property as a remainderman.

(b) The interest of the defendant herein as a beneficiary in a trust or trusts held and administered by the United States Trust Co. of New York, of 45 Wall Street, New York City, as Trustee, which interest in- [fol. 15] cludes, but may not be limited to the right to receive income and rents, issues and profits and the right to property as a remainderman.

(c) The interest of the defendant herein as a legatee and Co-Executor in the estate of Grace Graham Vanderbilt, deceased, of which the defendant herein, Grace Vanderbilt Stevens, of 4 East 72nd Street, New York City, Henry S. Hooker, of 50 Broadway, New York City, and the United States Trust Co. of New York,

of 45 Wall Street, New York City, are Co-Executors, which interest includes, but may not be limited to, (1) the sum of $50,000.00 outright, (2) one-half of all personalty, consisting principally of valuable jewelry, silver, watches, antiques, works of art, furnishings, household effects and personal effects, (3) commissions as an Executor.

(d) The interest of the defendant herein as a stockholder in Intercontinental Associates, Inc., of 110 East End Avenue, New York, New York.

(e) Royalties and other payments now or hereafter payable to the defendant herein from Intercontinental Associates, Inc., of 110 East End Avenue, New York City, Brentano's of 586 5th Avenue, New York City, or from any other person, firm or corporation in connection with or arising from the defendant's authorship of any and all books and publications, including, but not limited to, a book by the defendant entitled "Cor-
[fol. 16] nelius Vanderbilt Jr.'s Personal Travel Directory for Europe."

(f) Fees and payments now or hereafter due or payable to the defendant herein from literary agents, lecture bureaus or other persons, firms or corporations in connection with or arising from lectures given by the defendant, literary articles, books and publications authorized by the defendant, and films made or owned by the defendant,

and such other property, interests, assets, income, rents, issues and profits as the defendant may have or hereafter may have within the State of New York, and said Receiver is hereby directed and empowered to take possession of the said interests, personal property, both tangible and intangible, assets, income, rents, issues and profits, and the rents, issues and profits of any real property, and to collect, receive and hold the same until the further order or judgment of this Court, and that said Receiver have the usual powers and duties of Receivers and Sequestrators in such cases, and it is further

Ordered, that the defendant, Cornelius Vanderbilt, Jr., his attorneys, agents, representatives, servants and employees be and they hereby are enjoined and restrained

from in any manner transferring, assigning, conveying, mortgaging, pledging or otherwise disposing of any of said interests, property, assets, income, rents, issues and profits of said defendant, Cornelius Vanderbilt, Jr., and from in [fol. 17] any wise interfering with or hindering said Receiver in the possession of said property, interests, assets, income, rents, issues and profits and the collection and receipt thereof, and it is further

Ordered, that Cornelius Vanderbilt, Jr., Grace Vanderbilt Stevens, Henry S. Hooker and United States Trust Company of New York, Executors of the Estate of Grace Graham Vanderbilt, deceased, The Hanover Bank, individually, and as surviving Trustee under the Will of Alice G. Vanderbilt, as supplemented and continued under the Will of Cornelius Vanderbilt, and as Trustee under any other trust or trusts in which the defendant herein, Cornelius Vanderbilt, Jr., has any interest therein, beneficial or otherwise, United States Trust Company of New York, individually and as Trustee under the Will of Grace Graham Vanderbilt, and any other trust or trusts in which the defendant herein, Cornelius Vanderbilt, Jr. has any interest, beneficial or otherwise, Intercontinental Associates, Inc., Brentano's and any and all attorneys, representatives, agents, servants and employees of the defendant, Cornelius Vanderbilt, Jr., and any other persons, firms or corporations holding or possessing any interests, property, assets, income, rents, issues and profits belonging to the defendant, Cornelius Vanderbilt, Jr., or to which he is entitled, be and they are hereby respectively directed, until the further order or judgment of this Court, to deliver and turn over to said Receiver all moneys, interest, property, assets, income, rents, issues and profits in their possession, or under their custody or control, due or to become due to Cornelius [fol. 18] Vanderbilt, Jr., the defendant herein, and all directors, officers, attorneys, representatives, agents, servants and or employees of the aforesaid persons, corporations and companies, and all persons whomsoever having notice of this Order be, and they hereby are, enjoined and restrained from in any manner interfering with or hindering said Receiver in the discharge of his duties as such, and from paying out, transferring, assigning, conveying, mortgaging, pledging or otherwise disposing of any of the

said moneys, interests, property, assets, income, rents, issues and profits to any person or corporation other than to turn the same over to the said Receiver, and it is further

Ordered, that the plaintiff herein and said Receiver may, from time to time, apply to this Court for such other and further powers, instructions and orders as may be necessary or proper.

Enter

W. C. H. Jr., J. S. C.

Filed April 21, 1954, New York County Clerk's Office.

[fol. 19] Supreme Court of the State of New York,
County of New York

Notice of Service by Publication—April 21, 1954

* * * * * * *

To Cornelius Vanderbilt, Jr.:

The foregoing summons is served upon you by publication, pursuant to an order of Mr. Justice William C. Hecht, Jr., Justice of the Supreme Court of the State of New York, New York County, dated the 21st day of April, 1954, and filed with the complaint in the office of the Clerk of said Court, at the Courthouse, Foley Square, New York, N. Y.

Dated: New York, April 21st, 1954.

Monroe J. Winsten, Attorney for Plaintiff.

[fol. 20] IN THE SUPREME COURT OF NEW YORK, NEW YORK COUNTY, SPECIAL TERM, PART II

* * * * * * *

Present: Hon. William C. Hecht, Jr., Justice.

ORDER DIRECTING SERVICE BY PUBLICATION—April 21, 1954

* * * * * * *

It appearing to the satisfaction of the court in the above-entitled action that the complaint herein demands judgment for a separation, and that after diligent inquiry, the plaintiff is unable to ascertain whether the defendant is or is not a resident of the State of New York, and the plaintiff having applied to this court for an order authorizing the service of the summons in this action on the defendant herein by publication, pursuant to the statutes and rules in such case made and provided, and it appearing further to the satisfaction of this court, that plaintiff has been, and will be unable, with due diligence, to serve the defendant herein personally within the State of New York, with the summons and complaint in this action,

Now, on reading and filing the summons and the complaint duly verified the 5th day of April, 1954, and the affi-[fol. 21] davits of Patri-a W. Vanderbilt, the plaintiff herein, Harry Hyman and Monroe J. Winsten, all duly sworn to the 19th day of April, 1954,

Now, on motion of Monroe J. Winsten, attorney for the plaintiff herein, it is

Ordered, that the summons in the above-entitled action, be served upon the defendant, Cornelius Vanderbilt, Jr., by publishing the same in the New York Law Journal and Morning Telegraph two newspapers most likely to give notice to the defendant, once in each of six successive weeks, together with the notice required by Rule 52 of the Rules of Civil Practice, and on or before the day of the first publication as aforesaid, that the plaintiff deposit in a post office or in any post office box regularly maintained by the Government of the United States a set of copies of the summons; complaint, and this order, and of the notice required by Rule 52 of the Rules of Civil Practice, contained in a

securely closed post-paid wrapper addressed to the defendant, Cornelius Vanderbilt, Jr., at 319 First National Bank Building, Reno, Nevada.

Enter

W. C. H. Jr., J. S. C.

Filed Apr. 21, 1954, New York Co. Clerk's Office.

[fol. 22] SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SUMMONS—April 15, 1954

Plaintiff designates New York County as the place of trial.

Plaintiff resides in the County of New York.

* * * * * * *

ACTION FOR SEPARATION

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, New York, April 5, 1954.

Monroe J. Winsten, Attorney for Plaintiff, Office and Post Office Address, 320 Broadway, New York 7, N. Y.

[fol. 23] SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

* * * * * * *

COMPLAINT

Plaintiff, complaining of the defendant, by Monroe J. Winsten, her attorney, respectfully shows to this Court and alleges:

For a First Cause of Action:

1. That plaintiff and defendant intermarried on or about the 7th day of September, 1948, in Greenwich, State of Connecticut.

2. That there is no issue of the marriage.

3. That plaintiff is now a resident of the State of New York, and has been such resident of the State of New York continuously for more than one year last past; and that at the time of the commencement of this action, plaintiff is a resident of the State of New York, and that plaintiff has been such resident of the State of New York continuously for more than one year prior to the commencement of this action.

4. That commencing in or about the middle of the year 1950, and continuously thereafter the defendant's conduct toward the plaintiff has been cruel, inhuman, harsh and abusive, in that the defendant repeatedly threatened to assault and beat the plaintiff thereby placing her in fear of [fol. 24] her life; the defendant did, on various occasions commit vicious and brutal assaults upon the plaintiff, thereby inflicting upon the plaintiff painful, serious and permanent injuries; the defendant repeatedly and frequently did falsely accuse the plainntiff, in some instances privately, and at times in the presence of other persons, and to other persons, both orally and in writing, that the plaintiff committed many acts of marital infidelity, that she had stolen various sums of money from the defendant; that she was addicted to the use of habit-forming narcotic drugs, that she had committed unspecified acts of immorality and violations of Federal laws of an unspecified nature, as a result of which the plaintiff was humiliated, insulted and disgraced. That during said period, the defendant

frequently became intoxicated and also was subject to violent fits of irrational behaviour and emotional instability, at which times he violently abused, intimidated and threatened the plaintiff. That the acts of the defendant hereinbefore and hereinafter described did seriously impair and undermine the plaintiff's mental and physical health, and caused her to suffer great distress and mental anguish.

5. That in or about the month of May, 1950, and frequently during the summer of 1950, in Beverly Hills, California, the defendant created frenzied and violent scenes during which he falsely and vilely accused the plaintiff of unchastity and forcefully and brutally laid hands upon the plaintiff, pushing her to the floor and forcefully keeping her pinned down while attempting to force her to confess to his false and malicious accusations.

[fol. 25] 6. That during the month of August, 1951, while plaintiff and defendant were aboard the SS America, enroute from Europe to the United States, the defendant falsely accused the plaintiff of having committed an act of marital infidelity aboard said ship, and he did viciously and brutally beat and strike the plaintiff, causing her to sustain severe and painful injuries as a result of which she was incapacitated and was permanently injured; and that ever since, plaintiff has been obliged to submit to continuous medical treatment and periodic periods of hospitalization for said injuries.

7. That on innumerable occasions during the years 1950, 1951 and 1952, and particularly on several occasions during May, July, August and November of the year 1950, in California, during June and July, 1951 in Europe, and between February and June, 1952, in California, and on several occasions in September, 1952, over the long distance telephone, the defendant falsely and maliciously accused the plaintiff of having committed various acts of marital infidelity, at the same time abusing and menancing the plaintiff and using vile and insulting epithets.

8. That on various occasions, and particularly in or about May, 1950, November, 1950, and February or March, 1952, the defendant falsely and maliciously stated to defendant's brother, David Bronaugh, orally in Beverly Hills, and Bel Air, California, and in writing, that plaintiff had committed various acts of marital infidelity.

[fol. 26] 9. That in or about the month of February, 1952, or March, 1952, at Beverly Hills, California, at the home of mutual friends, the defendant, in the presence of several persons, accused the plaintiff of marital infidelity which accusation was false, malicious and without foundation in fact.

10. That the defendant is the publisher of a newsletter of wide circulation, bearing the name "Vagabonding with Vanderbilt"; and that the defendant caused to be published in the issues of May 15, 1953 and August 15, 1953, of said newsletter, false and malicious statements, which in substance indicated that the plaintiff had committed acts of marital infidelity, all of which was done by defendant for the sole purpose of embarrassing and humiliating the plaintiff.

11. That on or about July 29, 1953, the defendant falsely and maliciously stated in writing to a mutual friend, in words or substance, that the plaintiff was in the hospital submitting herself for a cure for addiction to narcotic drugs; and upon information and belief, the defendant made similar false and malicious statements orally and in writing to other persons, and at times and places which are not now known to plaintiff.

12. That in or about the month of March, 1953, the defendant did falsely and maliciously state in writing to one or more persons in Los Angeles, California, in words or substance, that plaintiff was implicated in criminal and/or immoral acts; and upon information and belief, defendant made similar false statements to persons, and at times and places not now known to plaintiff.

[fol. 27] 13. That on or about November 18, 1952, the defendant falsely and maliciously stated in writing in an affidavit now filed in this Court, that plaintiff stole from the defendant the sum of $4,500.00, and in or about January, 1954, the defendant falsely accused the plaintiff of having stolen from the defendant the sum of $40,000 in bonds and $25,000 in cash; and upon information and belief, the defendant made similar false statements to persons, and at times and places not now known to plaintiff.

14. That the defendant is a person of great wealth, property, resources and means, and during the time plaintiff and defendant lived together he has maintained and con-

tinues to maintain a high standard of living such as is maintained by persons of great wealth and social position.

15. That the defendant is a widely-known world traveler, lecturer, author and publicist, and has substantial interests in, or wholly owns various lecturing, publishing, film and other business enterprises from which he derives a substantial income.

16. That in addition to the aforementioned, the defendant is a co-executor and a principal legatee under the will of his deceased mother, Grace G. Vanderbilt, and he is also the principal legatee under the wills of other members of his family, now deceased, as a result of which he has inherited and now owns valuable property, heirlooms, objects of art, jewelry and other assets, and he has derived and will continue to derive a substantial income from various trust funds established for his benefit under the afore-[fol. 28] mentioned wills or by inter vivos indentures of trust.

For a Second Cause of Action:

17. Plaintiff here repeats and realleges each and every allegation set forth in paragraphs numbered "1," "2," "3," "14," "15" and "16" of the first cause of action with the same effect as though the same were here fully set out at length.

18. That at all times, the plaintiff conducted herself toward the defendant as a dutiful, faithful and obedient wife.

19. That since September, 1952, without the consent of the plaintiff, and without cause or justification therefor, the defendant wilfully absented himself from and abandoned the plaintiff with the intent not to return to the plaintiff or to resume cohabitation with her at any place, and that since such time, defendant has evaded the plaintiff, and refused to resume their marital relationship, and still continues to do so, all in disregard of his duties and obligations as plaintiff's husband.

20. That in the early part of September, 1952, while plaintiff was in California, the defendant was in the City of New York after having returned from a European voyage. In accordance with instructions from defendant and in reliance upon his promise to remit the necessary funds, plaintiff concluded arrangements for the renting of a house

in Beverly Hills, California, to be used by plaintiff and defendant, upon defendant's expected return to California [fol. 29] to rejoin the plaintiff. Upon defendant's failure to remit the funds as promised by him, plaintiff was obliged to raise the funds to pay the initial rent and security for said lease by the sale of certain securities which represented her sole remaining personal savings. Shortly thereafter, defendant informed the plaintiff that he would not fulfill his promise to remit the money to the plaintiff because he had determined to terminate his marriage to the plaintiff, and that he would not rejoin the plaintiff, nor would he consent that the plaintiff rejoin him in the City of New York.

21. That at the time of said abandonment, plaintiff was wholly without any funds of her own to maintain herself and her child, or to pay for the continuous medical treatment she required, and for more than one year thereafter the defendant wholly failed, neglected and refused to make any provision for her adequate support, maintenance and medical treatment, as a result of which, and in order to provide the necessities of life for herself and her infant daughter, and to secure necessary medical treatment, plaintiff was obliged to and did incur debts and obligations of considerable sums which now remain unpaid, and plaintiff was obliged to and did sell various items of her personal effects and clothing from time to time.

22. That by reason of her lack of funds, plaintiff was evicted from various residences for non-payment of rent, and both plaintiff and her child suffered from malnutrition from lack of sufficient food, for which they required medical treatment and hospitalization.

[fol. 30] 23. That thereafter, plaintiff was obliged to make application for public assistance from the Department of Public Welfare of the City of New York.

24. That thereafter, and in December, 1953, the defendant commenced to remit to the plaintiff the sum of $300.00 per month for her support and maintenance.

25. That said sum of $300.00 per month is wholly inadequate to provide plaintiff with the necessities of life and the medical treatment she requires, or to support and maintain the plaintiff in the manner and style in which she had been supported and maintained during the period prior to defendant's abandonment of the plaintiff, and that said sum

is unreasonably small and wholly disproportionate and not commensurate with the defendant's wealth, income and financial position.

Wherefore, plaintiff demands judgment as follows:

1. Forever separating her from the bed and board of the defendant.

2. That reasonable provision be made out of the property and income of the defendant for the support and maintenance of the plaintiff.

3. That the plaintiff have such other and further relief as to the Court may seem just and proper with the costs and disbursements of this action.

Monroe J. Winsten, Attorney for Plaintiff, Office & P. O. Address, 320 Broadway, New York 7, N. Y.

(Verified by Plaintiff on April 5, 1954.)

[fol. 31] Supreme Court, New York County

* * * * * * *

Notice of Special Appearance and Demand—
April 29, 1954

Sir:

Please take notice, that the defendant, Cornelius Vanderbilt, Jr., hereby appears specially in the above entitled action solely for the purposes of contesting the jurisdiction of the Court herein, and that I am retained as attorney for said defendant herein and demand that copies of the complaint and of the sequestration and publication Orders and the affidavits upon which the same were based, and all other papers in this action, be served on me at my office No. 630 Fifth Avenue, New York 20, N. Y.

Dated, April 29, 1954.

Yours, etc., Sol A. Rosenblatt, Attorney for defendant appearing specially, Office & P. O. Address, 630 Fifth Avenue, Borough of Manhattan, New York 20, N. Y.

To: Monroe J. Winsten, Esq., Plaintiff's Attorney, 320 Broadway, New York, N. Y.

[fol. 32] SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

* * * * * * *

ANSWER

The defendant, Cornelius Vanderbilt, Jr., appearing herein specially, by Sol A. Rosenblatt, his attorney, answering the plaintiff's complaint herein:

First: Denies any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in the paragraphs of the complaint numbered "3", "22" and "23".

Second: Upon information and belief, denies each and every allegation contained in the paragraphs of the complaint numbered "4", "5", "6", "7", "8", "9", "11", "12", "14", "18", "19", "20", "21" and "25".

Third: Upon information and belief, denies each and every allegation contained in the paragraph of the complaint numbered "10", except so much thereof as purports to allege that defendant is publisher of a newsletter bearing the name "Vagabonding with Vanderbilt."

Fourth: Upon information and belief, denies each and every allegation contained in the paragraph of the complaint numbered "13", except so much thereof as purports to allege that on or about November 18, 1952 defendant [fol. 33] executed an affidavit thereafter filed in this Court making reference to plaintiff.

Fifth: Upon information and belief, denies each and every allegation contained in the paragraph of the complaint numbered "15", except that he admits that defendant is a widely known world traveler, lecturer, author and publicist.

Sixth: Upon information and belief, denies so much of the paragraph of the complaint numbered "16" as purports to allege that defendant is "the principal legatee" under certain wills.

Seventh: Repeats, reiterates and realleges each and every denial, above set forth, of the paragraphs of the complaint repeated and realleged in paragraph numbered "17" thereof.

Eighth: Upon information and belief, denies each and every allegation contained in the paragraph of the complaint numbered "24", except that defendant admits that for a period of time from about November 1953 defendant caused to be remitted to plaintiff the sum of $300.00 per month, with the understanding and agreement that said payments were made and to be made voluntarily, without obligation and wholly without prejudice to defendant and his rights and remedies in any matter or thing whatsoever.

For a First Separate and Complete Defense

Ninth: That heretofore, and on or about April 30, 1954, defendant caused a notice to be duly served in which he [fol. 34] appeared specially in this action solely for the purpose of contesting the jurisdiction of the Court over his person and of the subject-matter of the action, which notice of appearance was duly filed in the office of the Clerk of the County of New York.

Tenth: That thereafter, a motion was duly made on behalf of said defendant, appearing specially, to dismiss the complaint for lack of such jurisdiction, which motion was denied by an order made and entered in this action on June 16, 1954, wherein and whereby defendant was granted leave, pursuant to Civil Practice Act, Sec. 237-a, subd. 3(c), to allege in his answer the facts with respect to his said objection to jurisdiction of this Court.

Eleventh: That on June 30, 1953, a final decree of absolute divorce severing the bonds of matrimony between the parties hereto, was duly made and entered in favor of the defendant herein, Cornelius Vanderbilt, Jr., as plaintiff therein, against the plaintiff herein, Patricia W. Vanderbilt, as defendant, in an action duly maintained by said Cornelius Vanderbilt, Jr., as a resident and domiciliary of the State of Nevada, against said Patricia W. Vanderbilt, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, a court of competent jurisdiction, and said divorce decree is now in full force and effect and is binding and conclusive upon the parties hereto, and as the result of said divorce decree they were and are no longer husband and wife as of the date thereof. Annexed hereto and made a part hereof and

[fol. 35] marked Exhibit "A", is a true copy of said divorce decree dated June 30, 1953. A duly exemplified copy of said divorce decree has heretofore been filed in this action in connection with defendant's said prior motion to dismiss the complaint herein, and said duly exemplified copy of said divorce decree now remains on file in this action in the office of the Clerk of the County of New York and is incorporated herein by reference.

Twelfth: Said divorce decree dated June 30, 1953, is a bar to the maintenance of this action, is binding and conclusive upon this Court and is entitled to full faith and credit in all courts of this State, according to the provisions of Article IV, Section 1, of the Constitution of the United States; and the maintenance of this action by plaintiff and the sequestration and other proceedings taken by her herein, violate defendant's said Constitutional rights, in that they deny him equal protection of the laws, deny him due process of law, deny him the privileges and immunities to which he is entitled, and fail to give full faith and credit to the said Nevada divorce decree procured by defendant, as aforesaid, all in contravention of Article IV, Sections 1 and 2, and Section 1 of the Fourteenth Amendment to the Federal Constitution.

Thirteenth: That the Court has no jurisdiction of the subject-matter of the action.

For a Second Separate and Complete Defense

Fourteenth: Defendant repeats, reiterates and realleges each and every paragraph of this answer numbered [fol. 36] "Ninth" through "Twelfth", the same as if set forth herein in full.

Fifteenth: At the time defendant married plaintiff in the State of Connecticut, on or about September 8, 1948, defendant was a resident and domiciliary of the State of Nevada and plaintiff was a resident and domiciliary of the State of California.

Sixteenth: The parties hereto were never domiciled within the State of New York as husband and wife, and defendant has not resided within the State of New York at any time during the pendency of this action, but he has at all times since in or about the month of March 1953, been and

still is a resident and domiciliary of the State of Nevada. Defendant, also, for many years prior to his said marriage to plaintiff was a resident and domiciliary of the State of Nevada. Defendant is not engaged in the transaction of business within the State of New York.

Seventeenth: Defendant was not served personally within the State of New York with a copy of the summons in this action.

Eighteenth: That by reason of all of the foregoing in this defense contained, the attempted sequestration on plaintiff's behalf in this action, of defendant's property located within the State of New York, is wrongful, null and void.

Ninteenth: That this Court has no jurisdiction of the person of the defendant.

[fol. 37] Wherefore, defendant respectfully prays for judgment dismissing the complaint and each cause of action therein alleged; and that defendant have such other and further relief as to the Court may seem just and proper, together with the costs and disbursements of this action.

Sol A. Rosenblatt, Attorney for Defendant, appearing specially, Office & P. O. Address, 630 Fifth Avenue, Borough of Manhattan, New York 20, N. Y.

(Verified by Attorney for Defendant June 30, 1954.)

[fol. 38] EXHIBIT A ANNEXED TO ANSWER

No. 146,128 Dept. No. 1

In the Second Judicial District Court of the State of Nevada

In and for the County of Washoe

John S. Sinai, Attorney for Plaintiff

Filed Jun 30 9 39 AM '53, H. K. Brown, Clerk, By S. Hannun, Deputy.

CORNELII , VANDERBILT, JR., Plaintiff

vs.

PATRICIA W. VANDERBILT, Defendant

Decree of Divorce

The above-entitled action came on regularly for trial this 30th day of June, 1953, before the above-entitled Court without a jury, John S. Sinai appearing as attorney for the plaintiff, and the default of the defendant having been duly entered, made, and taken, and it appearing that the defendant has been legally and duly served with process and has failed to appear and answer within the time prescribed by law; and it appearing to the Court that the plaintiff is now [fol. 39] and has been for more than six weeks last past, immediately preceding the filing of the Complaint, a resident of and domiciled in the City of Reno, County of Washoe, State of Nevada, and the Court having listened to the testimony introduced at said hearing, from which it appears and the Court finding that all of the allegations of the complaint are sustained by the testimony, free from all legal exceptions as to the competency, admissibility and sufficiency, and the same having been submitted to the Court for its decision, and the Court having filed its Findings of Fact and Conclusions of Law, determining that the above-named plaintiff is entitled to a decree of divorce from the defendant upon the ground of Extreme Cruelty, Now, therefore,

It is hereby ordered, adjudged and decreed that the bonds of matrimony heretofore and now existing between the above-named plaintiff and defendant be, and the same hereby are, dissolved and declared forever at an end, said divorce to be in full force and effect immediately, there being no provision in the laws of the State of Nevada for interlocutory divorce or restrictions on remarriage of either party; that the marriage heretofore and now existing between the parties hereby is dissolved absolutely and forever, and they hereby are freed and released from the bonds of matrimony and all the duties and obligations thereof; and each of the parties hereby is restored to the status of unmarried persons.

Done in Open Court this 30th day of June, 1953.

(S.) John S. Belford, District Judge.

[fol. 40] In the Second Judicial District Court of the State of Nevada in and for the County of Washoe

No. 146128—Dept. No. 1

Cornelius Vanderbilt, Jr., Plaintiff

vs.

Patricia W. Vanderbilt, Defendant

I, H. K. Brown, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that I have compared the foregoing with the original thereof, and that I am the keeper of said original, keeping same on file in my office as the legal custodian, and keeper of the same under the laws of the State of Nevada, and I further certify that the foregoing copy attached hereto is a full, true and correct copy of the

Decree of Divorce

and now on file and of record in my office.

I do further certify that the same has not been altered, amended or set aside but is still of full force and effect.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Court this 30th day of June, A. D. 1953.

(S.) H. K. Brown, County Clerk. (Seal)

[fol. 41] I, John S. Belford, one of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe do hereby certify that said Court is a Court of Record, having a Clerk and a Seal; and that there is no provision by law for a chief judge or presiding magistrate thereof, that all of the said judges are placed by law on an equality as to authority; that H. K. Brown, who has signed the annexed attestation, is the duly elected and qualified County Clerk of the County of Washoe, and was at the time of signing said attestation, ex-officio Clerk of said Court.

That said signature is his genuine hand writing, and that all of his official acts as such Clerk are entitled to full faith and credit.

And I further certify that said attestation is in due form of the law.

Witness my hand this 30th day of June, A. D. 1953.

(S.) John S. Belford, One of the Presiding Judges of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

[fol. 42] State of Nevada,
County of Washoe, ss.:

I, H. K. Brown, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, do hereby certify that the Honorable John S. Belford whose name is inscribed to the preceding Certificate, is one of the Presiding Judges of said Court, duly elected and qualified, and that the signature of said Judge to said Certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Court this 30th day of June, A. D. 1953.

(S.) H. K. Brown, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe. (Seal)

[fol. 43] IN THE SUPREME COURT OF NEW YORK,
COUNTY OF NEW YORK

SPECIAL TERM, PART IX

Case

Before: Di Falco, J.

New York County Court House, 60 Centre Street,
New York 7, N. Y.

January 10, 1955

APPEARANCES:

Monroe J. Winsten, Esq., Attorney for Plaintiff.
Sol A. Rosenblatt, Esq., Attorney for Defendant.

Robert Fisher, Official Stenographer.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Winstein: If your Honor please, I should like to make a preliminary motion in advance of the opening of the trial.

An order was made in this action at Special Term by Mr. Justice Benvenga, a plaintiff's motion for an examination of the defendant before trial. There were two orders made, and I am referring to the last order made by Mr. Justice Benvenga, dated December 9th.

On that motion we sought to examine the defendant before trial concerning his Nevada residence on the issue as to the validity of his domicile in that State. The order was granted ultimately to the extent of permitting the plaintiff to take written interrogatories of the defendant, [fol. 44] or, in the alternative—and I quote from the order of December 9th:

"Or in lieu thereof, may apply to examine the defendant at this court prior to the trial upon proof of defendant's presence in New York, or may apply to examine the defendant as to Item 1, covering the period prior to March of 1953."

The balance of it is immaterial at this point.

Now, we have had no means of knowing the whereabout of the defendant, consequently have been unable to make

any application to this court based upon proof of the defendant's presence in this State.

I made a similar request of the court at Special Term, Part III, at the first calling of this case on January 3, 1955, requesting that the defendant's counsel produce the defendant for the purpose of this examination in advance of the trial, and at that time I believe it was counsel's statement that—I don't know if I am quoting him correctly, I will ask him to correct me if I am wrong—that he had no knowledge whether the defendant would be here or not.

At this point I should like the record to indicate whether or not the defendant is going to be here, and if he is going to be here I request that this Court permit us to examine the defendant with respect to the issue that was granted before this trial begins.

Mr. Rosenblatt: The defendant is not here and does not propose to be here, your Honor. Now, may it please your Honor, I wish to move pursuant——

Mr. Winstein: Excuse me, Mr. Rosenblatt. Do I interpret counsel's remarks that he is not supposed to be here, [fol. 45] to mean that he does not intend to produce the defendant for this trial?

The Court: The question as I understand it is, is he here and does he expect to be here, and the answer is no?

Mr. Rosenblatt: That's right.

Mr. Winstein: Counsel used the word "supposed" instead of "expect".

The Court: That's what you mean, is it, Mr. Rosenblatt?

MOTION FOR SEPARATE TRIAL ON VALIDITY OF NEVADA DECREE AND RULING THEREON

Mr. Rosenblatt: That's right. Now, may it please the Court, the defendant moves under Civil Practice Act, Section 443, Subdivision 3, for a separate and prior trial of the issue as to the validity of the Nevada divorce decree obtained by him against the plaintiff on June 30, 1953, prior to the time plaintiff had completed her one year's alleged residence in New York, and at a time when the defendant had never been a resident of the State of New York at any time.

I have a brief in support of this, and I ask your Honor to consider it, and in support of that motion I ask your

Honor for leave to file an exemplified copy of all proceedings in Case No. 146,128, in the Second Judicial Court of the State of Nevada, in and for the County of Washoe, and including the decree of divorce duly rendered in that court on the 3rd day of June, 1953, all of such papers being duly exemplified by the proper officials of that court pursuant to our statutes, and I ask that this be deemed, or rather marked in evidence as part of this application.

The Court: Is there any objection?

Mr. Winsten: Yes, your Honor, I quite strenuously object to this for the following reasons:

[fol. 46] A consideration of this motion, if your Honor please, requires also a consideration of Section 1170-B of the Civil Practice Act, and for this reason. Section 1170-B of the Civil Practice Act provide in substance that notwithstanding any finding by this Court that the Nevada decree obtained by this defendant ex parte is jurisdictionally valid, and therefore entitled to full faith and credit under the Constitution, that this Court is empowered to grant maintenance and support to this plaintiff as justice may require.

Now, bearing that Statute in mind, if your Honor please, this application for a separate trial of the issue of the validity of the Nevada decree should be denied for this reason:

A separate and prior trial of a special issue is granted only in the event that a disposition of that special issue would dispose of the litigation in its entirety, and so the cases hold, if your Honor please.

Now, this motion was made by counsel at Special Term before Judge Rabin. Judge Rabin denied the motion for a separate and prior trial of that special issue, and an appeal was taken to the Appellate Division, and the Appellate Division affirmed that denial.

Now, let us get back to the substance of the motion.

Even if this Court were to hold ultimately that the defendant's domicile in the State of Nevada was a valid one, that it was not a fraud, that would not dispose of the litigation because even if this Court were to sustain the validity of the Nevada decree, the Court would still have to proceed to the trial of the main, principal issue in this case, and that is the issues under the complaint as to

whether this plaintiff is entitled to support and maintenance.

[fol. 47] The cases uniformly hold that a separate and prior trial of an issue should be denied and the party should not be compelled to go through two trials unless a disposition of that separate issue would dispose of the litigation.

Mr. Rosenblatt: May it please the Court I would like to refer you to the first page of the brief I just filed.

The Court: I see it.

Mr. Rosenblatt: To Mr. Justice Rabin's opinion in which he says: "The cross-motion seeking a separate trial"—and this was a cross-motion to a motion for alimony and counsel fee, and the alimony was denied—"of the validity of the foreign decree is denied at this time. The wisdom of trying this defense separately is left for the disposition of the Trial Justice."

I would like, if your Honor desires, to consider the question of law raised by my motion to also file with you the trial brief itself, which is much more voluminous and much more extensive and has specific reference to those cases which hold that the State of New York has no interest in the affairs of those who have no rights established for matrimonial actions in this State at the time that the actions allegedly are complained of.

In other words, if your Honor understands from the statements of plaintiff's counsel that he is not proceeding under Section 1165, which says that a person who lives here for one year has got a right to bring an action for separation, but is rather proceeding under Section 1170-B, then I direct your Honor's attention to the report of the Law Revision Commission of the State of New York, Legislative Document No. 1953, No. 65-K, which accompanied the proposed Statute submitted by the Commission to the Legislature, and which at the very end makes the distinct [fol. 48] statement on page 6 of such publication that the Commission believes that the legislation is necessary to protect a New York wife whose right of support from her husband may be completely cut off by a foreign decree, and I submit to your Honor that when you order a trial of the validity of the Nevada decree, you will find that there are no rights of a New York wife involved at the time of the rendition of that decree, and under the Meth-

fessel case, which is the only one on this subject, and it is cited in the trial brief, you will find that the application in its entirety must be denied.

Mr. Winsten: What was the name of that case?

Mr. Rosenblatt: Methfessel case.

Now, will your Honor accept an exemplified copy, and may I have it marked?

Mr. Winsten: Are you through with your statement, Mr. Rosenblatt?

Mr. Rosenblatt: Yes, of course.

Mr. Winsten: In connection with counsel's last statement, this action is brought under Section 1165, under 1170 B, and under every other Section of the Civil Practice Act that could possibly authorize the maintenance of this action.

The Court: If it was not brought under 1165, it would not be stating a cause of action here.

Mr. Winsten: Exactly.

Mr. Rosenblatt: That is exactly right. We both agree on that, your Honor.

Mr. Winsten: Now, if your Honor please, I address myself specifically to the last remarks made by counsel. Counsel makes a gratuitous assumption in his last statement that plaintiff is not a New York wife, and then proceeds to define and to make his own definition of what a New York wife is.

Mr. Rosenblatt: I did not say that. I said that she was not a wife——

[fol. 49] The Court: He was referring specifically to the time of the divorce decree in Nevada.

Mr. Rosenblatt: That's right.

Mr. Winsten: And that is what I am addressing myself to, your Honor, because Mr. Rosenblatt has made the gratuitous assumption that a New York wife must be a resident for one year before she is a New York wife, and that is not the intent of the Statute.

The Court: Your argument is that if he is a New York resident then she is a New York wife even if she was a resident for one day.

Mr. Winsten: We contend that he was not a resident of Nevada. Now my argument is this, your Honor: That she was a resident of New York, and if she was a resident of New York for one day she is a New York resident. The

question of one year is a prerequisite for the maintenance of an action, but that is not a prerequisite for the definition of who is a domiciliary of this State. If I come into this State this morning with the intent of becoming a resident of this State, I am a New York resident.

The Court: Do you want to say anything else?

Mr. Rosenblatt: I just want this marked so that I could hand it up to your Honor.

The Court: Mark it. I made a study of the situation over the week-end, gentlemen, and my decision on your application is as follows:

The defendant's motion for a prior and separate trial of the issue of the bona fides of a Nevada domicile is denied.

Special Term denied the same application, which denial was affirmed by the Appellate Division.

Upon the renewal of the same application before me I shall deny the motion as consistent with prior ruling in [fol. 50] respect thereof, and also upon the ruling in Flynn vs. Royal Development Company, 260 App. Div. 590, 40 N. Y. Sup. 2nd 418, and as cited in Carmody New York Practice, Volume 6, 2nd Ed. Sec. 982, page 806, where it is stated that the trial of a separate issue must be denied if it appears that a determination of the separate issue will in any event not end the litigation.

I have studied the pleadings and the applicable law and the decisional cases over the week-end in preparation for this trial, and I find that even were I to grant the prior trial and even find adversely to the plaintiff on this one issue, she still would have the right, and the Court has the power to grant her relief pursuant to Section 1170-B of the Civil Practice Act.

This determination is fortified by holdings in such recent cases as Essenwein vs. Essenwein, 325 U. S. 279, Estin vs. Estin, 334 U. S. 541, May vs. Andersen, 345 U. S. 528, and the recent new enactment of Section 1170-B of the Civil Practice Act.

Orderly procedure therefore requires a denial of the defendant's motion as I have already indicated. The plaintiff will proceed with her proof as pleaded and the issues raised. The defense will follow in due course in accordance with the established principle of trial procedure.

Mr. Rosenblatt: I have my exception, and I ask your Honor to mark this. Will you have it marked as a defendant's exhibit?

The Court: All right, mark it.

(Papers marked Defendant's Exhibit A.)

Mr. Winsten: May I have a two-minute recess?

The Court: Yes.

(At this point a recess was taken.)

[fol. 51] (After recess.)

Mr. Rosenblatt: May it please your Honor, I wish to preserve and ask you to take notice of the notice of special appearance and demand filed on behalf of this defendant dated April 20, 1954, filed in this court on April 30th, and the fact that such special appearance averring that this Court has no jurisdiction either of the person or the subject matter, is preserved by the defendant's answer.

Mr. Winsten: For the purposes of the record, if your Honor pleases, in lieu of offering or marking the original papers in evidence, I should like to record to indicate the following:

That the complaint in this action was verified on April 5, 1954.

That on April 21, 1954, an order was granted by Mr. Justice William C. Hecht, Jr., directing the service of the summons in this action by publication on the defendant in this action.

That on June 7, 1954, proof of service in compliance with the order of publication dated April 21, 1954, was duly filed in this court.

That on April 21, 1954, another order was granted by Mr. Justice William C. Hecht, Jr., directing that the property and assets of the defendant in this State be sequestered pursuant to Section 1171-A of the Civil Practice Act, and appointing Thomas McCoy, Esq., of 20 Pine Street, New York City, as a receiver and sequestrator.

I should like the record further to show that the receiver has qualified by filing his oath dated April 29, 1954, and

filed on the same day in the office of the Clerk of the County of New York.

In addition thereto the receiver filed a bond, dated April 22, 1954, and filed on the same day, and on April 30, 1954, an order was made by Mr. Justice William C. Hecht, au-
[fol. 52] thorizing the receiver to retain counsel to act on his behalf.

On July 2, 1954, an order was made by Mr. Justice Henry C. Greenberg, authorizing that the moneys, funds and income should be paid over to the receiver and sequestrator and deposited in the Hanover Bank, and directing that an additional bond of $20,000 be filed.

On July 8, 1954, a bond dated July 5, 1954, in the amount of $20,000 was filed by the receiver.

On September 10, 1954, an order was made by Mr. Justice Edgar J. Nathan, Jr., directing the receiver and sequestrator to execute and file with the Clerk of this Court an additional bond in the amount of $10,000.

On September 16, 1954, a bond dated September 15, 1954, in the amount of $10,000 was filed by the receiver.

Mr. Rosenblatt, is my statement correct, the statement I made for the record, I mean? Do you want to examine the papers that I have just referred to?

Mr. Rosenblatt: No, of course not. I would like to ask your Honor if you are at all interested in reading our trial brief?

The Court: I am. I have not received it until just now.

Mr. Rosenblatt: Thank you.

The Court: I have not received it. I have one from Mr. Winsten.

Mr. Rosenblatt: I would like also to ask your Honor if you are interested in receiving our brief in opposition to any application by plaintiff under C. P. A. Section 1170-B, although I do not believe under the wording of that Statute there is any right to such application until your Honor first dismisses this case. That's what the Statute says.

[fol. 53] PATRICIA W. VANDERBILT, the plaintiff, called as a witness in her own behalf, being first duly sworn, testified as follows:

(The witness states she resides at 138 East 38th Street, Manhattan, New York City.)

Direct examination.

By Mr. Winsten:

Q. Mrs. Vanderbilt, are you the plaintiff in this action?
A. Yes.
Q. When and where were you married to the defendant?
A. On September 7, 1948, in Greenwich, Connecticut.
Q. Can you keep your voice up a bit? Can you hear her, your Honor?
The Court: A little louder.
Q. A little louder, please.

Mr. Winsten: I offer in evidence a photostat of the marriage certificate.
Mr. Rosenblatt: No objection.

(Received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Rosenblatt: May the record show, your Honor, that in addition to the exception given me by law to your Honor's ruling in connection with the application I made for a separate and prior trial on the issue of domicile, that my exception continues to any and all testimony to be offered by the plaintiff on any question except that of domicile, and that my exception is based upon the fact that the rights of the defendant are preserved and are [fol. 54] to be preserved by the provisions of Article I of the Constitution of the State of New York, and of the Constitution of the United States, Articles I and IV, and amendments V and XIV.

Mr. Winsten: In that connection, I should like to offer to the Court a memorandum briefing the question as to whether the Court is precluded with respect to the proof offered under the complaint, if your Honor will accept that memorandum.

Q. Now, after your marriage to the defendant, where did you go?

A. We went to 1048 Fifth Avenue, New York City.

Q. Is that the home of his deceased mother?

A. Yes.

Q. And did you reside together after that?

A. Yes.

Q. And how long did you remain at 1048 Fifth Avenue?

A. For a few weeks, and then we went to Chicago.

Q. And how long did you remain in Chicago?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Rosenblatt: Now, may it please the Court, I ask that the Court take notice not only of the report of the Hon. Harold S. Lazar, Referee, appointed by order of this Court dated the 4th day of December, 1952, to hear and report to this Court upon the issues of fact, filed in this court, and confirmed in all respects by the order of Mr. Justice Greenberg on February 27, 1953——

The Court: I have not seen that report, I know nothing about it.

[fol. 55] Mr. Rosenblatt: I would like to hand it up. The files are in the court.

Mr. Winstein: If your Honor please, that report has absolutely no relevancy or materiality, and I should like to make a short statement concerning it.

The Court: I know nothing about it. Is it part of this file?

Mr. Rosenblatt: It is a part of this file in a previous action between the same parties.

Mr. Winstein: For what purpose is counsel offering that report, in respect of what issue before this Court at this time?

The Court: Just a minute, let me get it first, and then we will talk about it. Now, what do you want to say about this report and the order of Judge Greenberg?

Mr. Rosenblatt: That that is res adjudicata binding upon this Court as to any and all questions of domicile of either party prior to October 1, 1952.

Mr. Winstein: Well, I am not attempting to disprove or introduce anything inconsistent with that.

The Court: After 1948 they lived there for two weeks, that is, in 1408 Fifth Avenue, then from there they went to Chicago.

Mr. Rosenblatt: I do not propose in this Court to retry all the issues that I tried before Mr. Justice Greenberg on the question of domicile.

The Court: Let us get clear on this.

Mr. Rosenblatt: I object to any inquiry as to any questions of domicile prior to October 1, 1952.

The Court: How is this relevant as to where they lived right after their marriage?

[fol. 56] Mr. Winsten: On the question of cruelty and abandonment.

The Court: I will take it.

Mr. Rosenblatt: I except, and I reiterate my exception on the ground that the proceedings, which have been accepted as Defendant's Exhibit A in this court, and in the decree of the Nevada court rendered on June 30, 1953, have determined that the above-named plaintiff, Mr. Cornelius Vanderbilt, Jr., is entitled to a decree of divorce from the defendant on the ground of extreme cruelty, and that this Court has no jurisdiction to retry any such issues which might have, could have, and should have been litigated in the Nevada action.

Moreover, if your Honor please, I respectfully except to your Honor's ruling, and ask your Honor to reconsider upon the ground that in this very court, by notice of motion dated June 19, 1953, this plaintiff swore on the 19th day of June, 1953, as follows:

"On June 9, 1953, I was handed a summons and complaint issued out of the Second Judicial District Court of Washoe County, Nevada, bearing Docket No. 146,128 1953, in which the defendant prays for a decree of absolute divorce. I cannot appear and defend in that action; and while I do not take any position concerning its validity, I know that if the defendant is permitted to continue that action he will have seriously prejudiced my rights in that he will have obtained a colorable divorce. I ask that this Court direct the defendant from taking any further proceedings in that action until this Court shall otherwise di-

[fol. 57] rect, so that if my appeal is successful, as I

believe it will be, I will not be hampered upon the trial by defendant's assertion that we are not married," and upon that application to enjoin this plaintiff from securing that decree, by order filed on July 3, 1953, made by Hon. Benjamin J. Rabin, a Justice of this Court, denied in full and in toto such application to enjoin the plaintiff from proceeding in the Nevada action, and I therefore say——

The Court: Wasn't that because she did not establish her residential requirements?

Mr. Rosenblatt: May it please your Honor, for whatever the reason was——

The Court: I say, wasn't that the reason? I just want the record clear.

Mr. Rosenblatt: No, no. I refer your Honor to the papers on file upon that motion, which will disclose to your Honor the facts that were before the Court at that time and upon which the Court made its decree, and I maintain that this plaintiff in this action is bound by the findings of res adjudicata in the preceding action on the point of whether the decree may be attacked, and I maintain to your Honor that that decree secured by one who was never a resident of the State of New York, and against a defendant who at that very time was maintaining but improperly that she was a resident in New York, that that decree is entitled to full faith and credit by this Court for all purposes.

The Court: Assuming that the evidence indicates in the trial of the issue here of domicile that the defendant was [fol. 58] not a resident of Nevada.

Mr. Rosenblatt: Yes, that he was not a resident of Nevada, that the burden is upon this plaintiff to prove it.

The Court: I say assuming the proof so indicates.

Mr. Rosenblatt: Your Honor will never get such proof.

The Court: I don't know what I am going to get here. I say assuming that to be so, then wouldn't this testimony be relevant and material?

Mr. Rosenblatt: Your Honor, my contention is very simple——

The Court: I appreciate the fact that you must make your objection to protect the record, but I would like to take this now at this time. I am not going to say you are

right or wrong at this time, but I can take it all subject to connection.

Mr. Rosenblatt: May it please your Honor, if the plaintiff is making her application here in this court under Section 1165, and I have adduced a decree, the burden is upon the plaintiff to overcome the validity of that decree. That is good law.

Now, if that decree is established, then under all the reported cases she is barred from seeking further relief in the State of New York unless she is entitled to relief under this Statute of 1170-B.

The Court: I agree with you there.

Mr. Rosenblatt: Now, when Mr. Justice McNally, whose opinion is part of the record in this case, made his decision on June 16, 1954, from which I did not appeal, Mr. [fol. 59] Justice McNally said as follows—and I think he has made the law in this case—he said:

"Section 1170-B makes available to a New York wife entitled to a divorce, separation or annulment, except for the operation of ex parte foreign decree severing the marriage, the rights of a wife in possession of a New York decree providing for her support antedating the foreign ex parte marital decree."

I think that is good law, and I subscribe to that, and that is why I did not appeal from Mr. Justice McNally, and I submit to your Honor that that is the law in this case.

The Court: Well, I still would like to say this: assuming that they are able to establish—and I know that you disagree with that—that the defendant was not a resident of Nevada at the time. Then what?

Mr. Rosenblatt: That is what I hope we are trying.

The Court: Then of course this evidence will be material, will it not?

Mr. Rosenblatt: No, it would not, unless it were offered for the period after October 1st, 1952. Your Honor is understanding now what I am urging. I say that this lady is entitled to every right to show, if she can, that he was not a resident, a legal resident of Nevada, when he got his decree. That's O. K. I am here prepared to meet it. I welcome that attack.

But I say in doing that she cannot go before October 1st, 1952, on any questions, because the decree of this Court is res adjudicata that on October 1st, 1952, the date [fol. 60] that she set in the state of California and verified a summons and complaint in a New York action, this Court held that neither party, not this plaintiff nor the defendant, had ever been a resident of New York at any time for a period of one year.

The Court: All right, let us take that chronologically and see if we understand each other.

Assuming that to be so, Mr. Rosenblatt, that prior to 1952 she was not a resident, that neither party was a resident—is that right?

Mr. Rosenblatt: That's right.

The Court: And then you subsequently obtained a divorce decree against this woman in Nevada?

Mr. Rosenblatt: That's right, in June of 1953.

The Court: In June of 1953. Then she comes into this state. She starts her first action. That is dismissed, and——

Mr. Rosenblatt: No, she sta-ted the first action before we ever got a decree.

The Court: All right; and she started actions here which were dismissed, and motions were made which related to the same action which determined that at that time this Court had no jurisdiction, in substance.

Mr. Rosenblatt: That's right; and this Court also refused to enjoin the defendant from proceeding with the divorce action. Remember, that she had appealed from the order of this Court, dismissing her action, and that that appeal was pending at the time she made the motion before Mr. Justice Rabin to enjoin Mr. Vanderbilt from proceeding with getting a decree.

[fol. 61] The Court: All right; there is no quarrel upon that. Now, then, she comes to this state and she establishes what she claims to be legal residence, more than one year, and she starts this lawsuit based on cruel and inhuman treatment, non-support, and abandonment.

Now, once she establishes, if she does, and that she has alleged here, that she is a resident of this state, she is doing two things now: she is attacking the residence of

her husband in Nevada upon which he obtained a decree—is that right?

Mr. Rosenblatt: I hope so.

The Court: That's what she is doing.

Mr. Rosenblatt: I don't know.

The Court: All right. Assuming she succeeds in doing that, then to all intents and purposes in so far as this Court is concerned, there is no decree that we are going to recognize.

Mr. Rosenblatt: That would be the case, your Honor.

The Court: All right. Assuming that to be so—I am trying to get this clear, and I am sure we are getting to the same point—assuming she gets to that point, and she establishes that, now she is offering testimony to the extent that is prior to 1953, or 1952, this defendant, her husband, in 1952 or 1951, he treated her cruelly, in 1952 he treated her in such a way that she was unable to live with him.

Don't you think that the evidence that she is offering to the effect that in 1952 or 1951 or in 1953 or in 1954, he treated her as she claims he did, that that has something [fol. 62] to do with the trial of the issue in this case, if she is successful on the other two questions?

Mr. Rosenblatt: Yes, but, your Honor, she——

The Court: That's why I am taking it.

Mr. Rosenblatt: But she first has got to be successful on the attack on the decree. Every case in New York says so.

The Court: I have already decided that motion, and I am taking both at the same time.

Mr. Rosenblatt: What your Honor is doing, then, is, at the same time that you are going to take testimony on whether or not the decree is valid, you are going also to take testimony on the very issue that was decided by that decree, so that if the decree is valid all of this testimony has to be stricken out.

The Court: I will do that. We can do that.

Mr. Rosenblatt: Don't you think that is a little prejudicial to this defendant, your Honor?

The Court: What prejudice can he suffer? If he is successful, he has suffered nothing. If he is not successful, we have tried the entire case.

Mr. Rosenblatt: We are not supposed, of course, your

Honor, as members of the bar, trying purely legal and factual issues before you, to take cognizance of what happened in the daily press, but I tell you, your Honor, that if this lady establishes that that decree is no good, that is one point of view, and the other is, that if she finds [fol. 63] that it is good, all she will have done is, to have given more publicity to charges which have no place and no right in this Court.

Now, I don't say that they have no right or place in some other court or that they could not have been brought in another court. There is no question about that, but she has come to make New York a Mecca for a disgruntled divoreee, and I tell your Honor——

Mr. Winsten: If your Honor please, that is an unfair statement. If counsel wants to argue law, that's one thing. If he wants to argue characterizations then I submit to your Honor it does not belong in this record.

Mr. Rosenblatt: I am basin, that statement upon the statement made by the Chancery Court of New Jersey which had the same subject matter before it and which said——

Mr. Winsten: You are not in the Chancery Court.

The Court: Let us not get involved with all of that.

Mr. Winsten: Does your Honor deem it necessary for me to make a further statement?

The Court: No, Mr. Rosenblatt, and I have discussed it and I thought he at least understands how I look at the problem at this time.

Mr. Winsten: May the record show that I have an objection and an exception to the introduction of the Nevada divorce decree, on the ground that it is the plaintiff's contention that the Nevada divorce decree is not entitled [fol. 64] to full faith and credit, for the reason that it is not based upon a proper domicile of the defendant in this action in the State of Nevada.

The Court: I received it at the time there was a motion made by Mr. Rosenblatt at the beginning of this trial to try both issues separately. I only received it on that point.

Mr. Rosenblatt: But it is on file in this court, your Honor. It has been referred to, it is part of the pleadings.

Mr. Winsten: That does not make it part of this record, if your Honor please.

The Court: All right, let's go on.

Mr. Rosenblatt: Do you want to offer it now for all purposes?

The Court: At the right time, not at this time. I have only received it in so far as the motion was concerned.

Mr. Rosenblatt: In view of the fact that my objections constantly have to be based upon it, I ask that it should be received for all purposes.

Mr. Winsten: That should be received in connection with this defense, your Honor.

The Court: I will take it later on when it is offered again.

Mr. Rosenblatt: I except.

Q. Now, are you a resident of the State of New York, Mrs. Vanderbilt?

A. Yes.

Q. And how long have you been a resident of the State of New York—I withdraw that. Have you been a resident of this State for more than one year continuously prior to the commencement of this action?

A. Yes.

[fol. 65] Q. Was it more than one year prior to April 5th, 1954?

A. Yes.

Q. Now, is there any issue of your marriage to the defendant?

A. No.

Q. Now, you have a child by a prior marriage, is that correct?

A. Yes.

Q. And her name is Nanette?

A. That's right.

Q. And how old is she now?

A. She is 13 now.

Q. Now, between 1948 and 1950 did you reside with the defendant, Cornelius Vanderbilt?

A. Yes.

Q. And did you make various trips to various parts of the world?

A. Yes, we did.

Q. And was your relationship with the defendant a happy one during that period?

Mr. Rosenblatt: I object. Let us have the facts.

The Court: Objection sustained.

Q. Well, how did you get along with the defendant between 1948 and 1950, and how did he get along with you? Tell the Court, if you can, in your own words, your relationship with the defendant?

A. We got along extremely well, very companionable, and everything was in most every way completely desirable. We went on numerous trips together, to Florida, and in and around Chicago, where he was lecturing. I helped him with his lecture material, and we were in Florida, in 1949, during the summer, we were in Europe, with my daughter and a nurse. We roamed all over Europe, Holland, Belgium, France, Switzerland, Italy and England. Everything was going extremely well. We came back from that European trip. We cut and edited film here in New York. I helped him. We seemed to be extremely happy.

[fol. 66] Q. Now, Mrs. Vanderbilt, how long were you in Europe with the defendant in 1949?

A. Approximately four months.

Q. And between 1948, September of 1948, and the spring of 1950, what sort of places did you live in with the defendant?

A. We lived here in New York at No. 1048 Fifth Avenue. We lived in Chicago at the Ambassador-East Hotel. We had a suite there, with some extra rooms.

Q. How many rooms did the suite comprise?

A. Four; and in Florida we stayed at two or three different hotels, and in Europe we stayed—in Paris we stayed at the Hotel Meurice, and the Ritz. We stayed in all the big hotels all over Europe and England.

Q. Now, during that period did you reside for any period—I withdraw that. During that period, between 1948 and 1950, did you stay with the defendant in the State of California at any time?

A. Possibly Christmas of 1949.

Q. Now, after your return from Europe in 1949—that was in about what month in 1949?

A. I believe it was August.

Q. Did you submit yourself to medical treatment for any reason?

A. Yes. I was taken to the hospital, I think it was the day after landing, for fatigue.

Q. And did you receive any advice from the attending physician as to where you should live after that?

A. He said I should get to a warmer climate for the winter, and I should build myself up, because I was extremely exhausted.

Q. And thereafter did you have any discussions with the defendant or make any preparations for going to another state or another climate?

A. Yes.

Q. Will you tell us what discussions you had with the defendant in that regard?

[fol. 67] Mr. Rosenblatt: May I have the time and place?

The Court: Yes.

A. Well, it would be around in September that we discussed——

Mr. Rosenblatt: What year is this, please?

The Witness: 1949.

Mr. Rosenblatt: And where?

The Witness: Here in New York.

Q. And where were you living at the time of this discussion?

A. At 1048 Fifth Avenue.

Q. Now, 1048 Fifth Avenue is what sort of a place?

A. It is a large house, about five or six stories.

Q. Is that where the defendant's mother, Grace G. Vanderbilt, resided?

A. Yes.

Q. And was there any particular portion of this building that you occupied with the defendant while you stayed there?

Mr. Rosenblatt: Now, may it please your Honor, I am terribly sorry to have to interrupt, but you will find in the report of Mr. Lazar, confirmed by this Court, a complete description of the premises at 1048 Fifth Avenue, the facilities there, the places of occupancy by either Mr. or

Mrs. Vanderbilt, at different times, and the problems with respect to this place that they occupied, and the fact that Mrs. Vanderbilt did not own the house. So would your Honor please take notice of those facts in connection with Mr. Lazar's report, approved by this Court?

The Court: Go ahead.

[fol. 68] Mr. Rosenblatt: I object upon the ground that inquiry into these subjects is foreclosed by the previous decision of this Court.

The Court: If it has no competency, if it is inconsistent therewith, I will strike it out. I have to listen to this evidence in order to make my own determination. I have got to have it in my record. I cannot simply take that record or that report—in other words, all we would have to do, if your point was well taken, would be to take your report into evidence and there would not be any testimony on these matters at all.

Mr. Rosenblatt: Exactly so, your Honor; and I say that those facts found by the Referee are res adjudicata in this action. Do you think that I have to go and sit through this all the weeks that I did before and retry all these things? Once it is tried and decided by this Court, why do I have to retry that?

The Court: You told me that the only issue here we have to try is that of domicile.

Mr. Rosenblatt: The question of the domicile of Mr. Vanderbilt.

The Court: Right.

Mr. Rosenblatt: In securing a Nevada decree, that is right.

The Court: This testimony may lead to it. I don't know.

Mr. Rosenblatt: In September, 1949?

The Court: She may want to show that he never lived any place except some places that she may testify to, I don't know.

Mr. Rosenblatt: May it please your Honor, then you have missed completely the point of my objection. If this [fol. 69] Court, after paying a Referee $7,500, plus over $3,000 in fees for the stenographer, taking over 40 some-odd exhibits on the one side, and over 87 on the other, which amounted to hundreds of exhibits——

Mr. Winsten: I think, your Honor, that I can cut this dis-

cussion short by saying that we are not introducing this evidence with respect to the defendant's domicile at that time. I am introducing that evidence with respect to the issue of the defendant's relations with the plaintiff, their mode of living, and things of that character. I am not trying to impeach the report of Referee Lazar.

The Court: All right.

Mr. Rosenblatt: Then I ask your Honor to take as evidence in this case the report of Referee Lazar and the order confirming such report, and I offer both as one exhibit.

Mr. Winsten: This is not the proper time to offer, if your Honor please.

The Court: The objection is sustained at this time.

Q. Now, Mrs. Vanderbilt, did there come a time during your marriage to this defendant when you experienced any difficulties with the defendant in your relations with him?

A. Yes, early in 1950.

Q. Will you please keep your voice up a little? I cannot hear you. Now, what occurred in 1950?

The Court: Where were you living at the time, Madam?

The Witness: I had leased a house in California, in January of 1950.

The Court: Go ahead. Where was this house?

The Witness: In Beverly Hills.

[fol. 70] Q. And how much rent were you paying there?

A. $800 a month.

Mr. Rosenblatt: May I clarify the word "you"? Does that mean Mrs. Vanderbilt, Mr. Vanderbilt, or both of them? You said, "you".

Mr. Winsten: I stand corrected.

Q. You were both paying $800 a month, is that correct?

A. Yes.

Q. Who was paying the bills at that time?

A. Well, Mr. Vanderbilt gave me the funds and then I believe that I wrote the checks to the owners, if that makes it clear.

Q. And did you have any servants in the house?

A. Yes.

Q. How many?

A. On a permanent basis, two; and then other people who came in periodically during the week.

Q. And how much were you paying those servants?

A. The cook would get around $200 a month, and the other girl received about $150 or $175 a month, plus bonuses; and the day people would get about $1.25 an hour, depending on what they were doing.

Q. Now, did you have any automobile?

A. Yes.

Q. What kind of an automobile?

A. Cadillac.

Q. And when was it purchased?

A. Well, that was an automobile that was mine, that Mr. Vanderbilt gave me before we were married. It had belonged to him prior to our marriage.

Q. Now, did you have a nurse for the child also?

A. I had a nurse for her when we were traveling through Europe, and I had a nurse in Florida. I had no nurse for her in California. I had a nurse for her here in New York too.

[fol. 71] Q. Did this house have a swimming pool?

A. Yes.

Q. Now, will you tell us what happened in 1950 between you and the defendant, madam?

A. Oh, we started arguments and discussions concerning a codicil to his mother's will.

Q. What did the defendant say to you specifically in that connection?

A. He said he wanted a codicil written, and his sister was very much against it, and he wanted to get even with his sister because of the father's will.

Mr. Rosenblatt: Now, I move to strike all that out, your Honor, on the ground it is incompetent, immaterial, and irrelevant, and is not within any of the issues in this action, and is being testified to on no issue whatsoever raised by these people.

Mr. Winsten: This is just a conversation which is the basis of a quarrel or a difficulty or something in connection with the marital relations between these parties.

Mr. Rosenblatt: I move to strike it all out upon the ground it is testimony in connection with some effort on somebody's part to have a codicil written to somebody's will, and what possible connection can that have with the

The Court: Did this discussion you are about to tell us result in any disagreement between you and your husband?

The Witness: Yes, sir; several.

Mr. Rosenblatt: May I have the time and place?

The Court: All right.

Mr. Rosenblatt: And who were present?

[fol. 72] Q. Tell us when and where this discussion took place, Mrs. Vanderbilt?

A. Well, some in New York and some in California.

Q. When did they take place?

A. During the early months of 1950 over a period of time. There were several arguments concerning this issue.

Q. Will you tell us what the defendant said——

Mr. Rosenblatt: I want to know what the conversion and arguments were and each place and each time, and I am entitled to that.

The Court: Do that, Counsellor.

Mr. Winsten: You will get it.

The Court: The first time you had this discussion where did it take place, Madam?

The Witness: It is difficult because there were several. I don't know whether the first one was in California or in New York.

The Court: All right. What, if anything, took place between you and your husband at that time, and if there was anybody present, just tell us who.

The Witness: There was no one present but me and my husband. He was overwrought because he wanted to get even with his sister, he told me, because she had done something concerning the father's will, and he was afraid that she was going to do something about the mother's will, and he said that when he was away, I believe in 1945, that his sister had had the mother's will changed, and now he wanted it changed, and he wanted the banks and the executors all changed.

Mr. Rosenblatt: May it please your Honor, can't you see what the implication of this testimony is? It is immaterial, irrelevant and incompetent, it has got nothing to do with this case.

[fol. 73]

The Court: What happened in so far as that is concerned between you and your husband?

The Witness: I told him that I did not think he should do anything that seemed to be his lawyer's opinion, that he should leave it alone, and it was making him entirely too nervous, and the he had said to me that he wanted me, when I talked to his sister, to tell her that he had a report from J. Edgar Hoover, the Federal Bureau of Investigation, concerning her husband, and that he would be put into the Federal Penitentiary unless she did it.

The Court: Objection sustained.

Mr. Rosenblatt: And I move to strike it all out as outrageous, your Honor.

Q. Did he ask you to do anything in that connection, Mrs. Vanderbilt?

A. He asked me to inform his sister of this report, and that that would induce her to agree to a codicil, and if she agreed then she could not attack it later, and I said, "No, I could not do it and I would not do it, I consider it wrong."

Q. What did he say?

Mr. Rosenblatt: Pardon me, I have got a right to have my statements on the record, sir. I move that all this interrogation not only be stricken out, but I ask your Honor to dismiss this case at once upon the ground that an obvious attempt here is being made to create some kind of a public [fol. 74] smear and scandal, completely extraneous to the issue which must be determined prior to any other, of domicile, and not within any of the issues raised in the pleading.

Mr. Winsten: In that connection, your Honor——

The Court: Just a minute. There are two motions made by Mr. Rosenblatt. Which do you want first, Mr. Rosenblatt? You made two motions.

Mr. Rosenblatt: I moved first to strike this all out.

The Court: Strike it out unless you get down to the basis of the allegations in this lawsuit.

Mr. Winsten: Yes, your Honor, and I intend to right now with my next question.

The Court: And number two, the motion——

Q. Now you testified that—what was your response to the defendant when he made this request?

Mr. Rosenblatt: May I have the time and place fixed, please?

The Court: When did this happen?

Mr. Rosenblatt: And where?

The Court: And where? Try to do that in every instance, Counsel, so that we don't have to waste so much time.

Mr. Winsten: Yes, I will do that, your Honor.

Q. You said this was in the early part of 1950. Can you identify it any closer than that?

A. It is extremely difficult. It went over several months, and I was here in New York and I was also in California, [fol. 75] and he was with me in both places, but there were scenes in New York about it and there were scenes in California about the same thing.

Q. You cannot identify the time any closer than you have, Mrs. Vanderbilt?

A. I cannot see how.

Q. Well, when he made this request of you, what did you say to him?

A. I told him I would not do it. I thought it was completely wrong, and I did not want him to do it, and then——

Q. What was Mr. Vanderbilt's reaction? What did he do or say when you told him that you would not do it and you thought it was wrong for him to do it?

A. He would get up and prance back and forth in the room and rave at me and say that I have to do whatever he wanted me to do, that I was his wife. I said I could not do it because I considered it wrong, I considered it wrong for him to do it.

Mr. Rosenblatt: I move to strike this entire bit of testimony out on the ground it is immaterial and incompetent.

The Court: Are you finished?

The Witness: No, because he would go on for hours, and then eventually he would take me and push me down and tell me I had to.

Mr. Rosenblatt: Now, your Honor——

Q. On how many occasions did that take place, Madam?

A. About six times he pushed me, he would hold me down, with his hands, in a chair or against the wall.

Q. And what did he say to you at the time that he was holding you down against a chair or against the wall?

A. He would say the same things over and over, that I was stupid and I did not know how things were done in the world, and this was the way that he would get what he wanted.

[fol. 76] Mr. Rosenblatt: I renew my motion to strike, your Honor.

Q. Now, in that connection, was there any correspondence between your and the defendant on this subject?

A. Yes.

Q. Did the defendant have occasion to write you a letter on the question, on the subject of the change in the mother's will?

A. He wrote me about it, yes.

Q. Now, what happened during that spring of 1950—I withdraw that. Did you have any other disputes or differences with your husband on any other subject during the spring of 1950?

A. Yes. He accused me on several occasions of carrying on an affair with my daughter's dancing teacher. He did it to me directly and he did it in the presence of my brother on several occasions.

Q. What did he say and what did he do, and what was your reaction, and what did you say to him when that occurred?

The Court: When did this happen?

The Witness: This is in the same period of early 1950 and then it goes on from there.

The Court: What happened when he accused you of these things? What if anything happened? What did he say to you and what did you say to him?

The Witness: He wanted to know why I was seeing the dancing teacher so often, and I said that I was not seeing the dancing teacher, I was taking the child to her lessons and I remained while she had her lessons and then returned to the house with her. He said that he had reports to the effect that I was seeing this dancing teacher and I [fol. 77] denied it over and over and over and over again to him in front of my brother, and when he would——

Q. Was your brother present at any of these occasions?

A. Yes, he was in California, he was staying with us for several weeks.

Q. And your brother's name is David Bronaugh?

A. Yes.

Q. What happened on the occasion when your brother was there?

A. Well, my brother would then say to Neil that of course he knew it was not true, he had been there with me when Neil was away and that there was not anything at all going on with the dancing teacher, that the dancing teacher had equipped a room, a vacant room in the house as a dancing studio for the child in order to rehearse and practice, and that he had been present on many occasions when I was in the dancing school with the child, and how could Neil possibly conclude such things. Then I asked Neil, I said, "Please tell me who could possibly—if there be such reports—who could make them, and please to bring it all out in the open."

Q. Now during this period in the spring of 1950 did Mr. Vanderbilt, the defendant in this action, do or say anything calculated to force you to admit these accusations?

Mr. Rosenblatt: Now, may it please your Honor——

The Court: Objection sustained to the form of the question.

Q. Mrs. Vanderbilt, was this accusation true?

A. No.

[fol. 78] Q. What did the defendant say or do at the time he made these accusations?

A. Well, on occasions he would get extremely riled about it, and he had this habit of grabbing me by the shoulders and pushing me against a wall or into a chair, or onto a bed if we were in the bedroom, and saying that I had to admit this, that he knew it was true, and that I should admit it. I could not admit it, there was not any truth to any of it.

Q. And how long would these scenes last when they occurred?

A. Sometimes for hours. He would talk about things and then he would jump from one subject to another.

Q. When you say one subject to another, what subjects do you have reference to?

A. He would go back to the thing about his sister and then he would——

Q. Would you like a recess now?

A. No.

Mr. Winsten: May we have a five-minute recess?

The Court: Do you want a recess, madam?

The Witness: I get very dry, but I am all right.

The Court: Get her some water.

Mr. Winsten: Could I have the last question, please?

(The last two questions and answers repeated by the stenographer.)

The Court: Go ahead.

The Witness: Well then I remember on several occasions that I asked him was he making this accusation concerning this dancing teacher because I would not do what he wanted me to do in connection with his sister, and then he would [fol. 79] get more violent towards me and just keep pushing me around.

The Court: Tell us what he did, madam.

The Witness: He would take me by the shoulders and push me against the wall, or into a chair, and tell me that I would have to admit to this thing that he knew about, that he said was going on with the dancing master. I said, "Neil, we have to be logical. He teaches my daughter to dance. There is nothing between us."

Q. Now, during that period in 1950 were you under the care of a physician?

A. Yes, I was.

Q. And would these disputes and conflicts that you testified to with the defendant have any effect on your health?

A. Yes, they made me extremely nervous to the point sometimes during a meal I could not even eat because he would say things during that meal concerning all of this business about this dancing teacher and his sister, and I could not eat. I started then to lose weight, many weeks of it, night after night, and then he would go away to New York or to Washington or some place, and then I would begin to feel a little better and then he would come back and then he would start in all over again.

Q. During the periods that he was away did he telephone you?

A. Oh, yes, daily; sometimes two, three, four times a day.

Q. At this period of time were there any discussions over the long distance telephone with respect to the things you just told us about?

A. Yes.

Q. Will you tell the Court about that?

A. Yes. Well, he called me several times from New York concerning the codicil. He said he was getting ex- [fol. 80] tremely nervous and over-wrought about it, and he felt that his sister and his brother-in-law would attempt to make him so nervous he would collapse, and I said, "Neil, please forget the whole thing and drop it." And he said, "You must help me with it, you must do it."

Mr. Rosenblatt: I move to strike it out, your Honor, both the question and the answer, on the ground it is irrelevant, immaterial and incompetent. It has nothing to do with the issues in this case, and it is proof of nothing except that they had a telephone conversation.

The Court: Was that subsequent to the first conversation you had with him or was that the first conversation had with him over the telephone?

The Witness: No, there were many, many phone calls. He knew that the subject made me extremely nervous, I did not want him to do it.

The Court: I will allow it. What was he telling you to do, if anything?

The Witness: Concerning his sister, sir. He wanted me to tell her that her husband——

The Court: He wanted you to tell her husband—that is, he wanted you to tell his sister?

The Witness: Yes.

The Court: And you refused to do that, is that right?

The Witness: Yes.

The Court: All right, next question.

[fol. 81] Q. Now, following these discussions and accusations with respect to the dancing teacher did the defendant make any other accusations during the year 1950?

A. Yes. I believe in October of 1950, yes, October, he was angry one night with me and said that he had information from some people at the Democratic Headquarters

in California to the effect that I was constantly at the Democratic Headquarters to see an official there.

Mr. Rosenblatt: May we have the time and place.
The Court: She said October 1950.
Mr. Rosenblatt: But where?
The Witness: In California.
The Court: He stayed then in California?
The Witness: Yes.
The Court: All right.

Q. What happened? What did you say when he made that statement to you?

A. I said, "Neil, I have never been to the Democratic Headquarters. I don't know where you get such information, and I do believe you are making it all up." I pointed out to him, how could a thing take place in a place that I had never been to. So then he went away, late in October, and he was away part of November, and he was on the phone again sometime after the elections.

Q. Of 1950?

A. Yes, this is the Gubernatorial Election, and he stated this thing over again several times. He said that he had reports that I was carrying on an affair again with this person at the Democratic Headquarters. I said, "Neil, it is impossible, and it cannot be true. I have only—on the night of the election I was in the Democratic Headquar- [fol. 82] ters with Mr. and Mrs. James Roosevelt, and that is the only time I was there"—and, please, if he wanted to be honest, to please come out and say what he was attempting to drive at, because there was not anything that—I mean, he had me so confused, vague accusations in the dark about some man, I could not get him to say, well, now, who, just what are you talking about.

So then I got so nervous over that, I had told him in October that he was distressing me terribly, it was having an effect on me, and it was having an effect on my child, and that I was going to have to get away alone. So then after more of these phone conversations in November I did go away. I went away for about four or five days. Neil was not in California, and I wired him and said that I was going on a rest cure and that I would be back when he

was expected back, so then I did and I spent four or five days by myself in the hotel.

Mr. Rosenblatt: May we have the time and place of this fixed?

The Court: Yes, tell us.

Mr. Rosenblatt: And the hotel and when.

The Witness: This is in November. This is the week before Thanksgiving, and I went to Santa Monica, California, and stayed at—I forget—it is the Miramar or Mirasol Hotel, it is one of those. There is one in Santa Barbara that sounds like it, and I stayed at both, and then I came back to the house and I took my child and a maid. Neil had not arrived, and we went to Palm Springs, and while I was in Palm Springs we all stayed together in the same cottage.

The Court: With your husband?

The Witness: No, no, my husband was not there; with the maid and the child.

[fol. 83] Q. Where was your husband at that time?

A. I don't know where definitely. He was not in California. I believe he was lecturing, and I am not sure of that, but while I was in Palm Springs, before I left I had left a note with the cook in the house in California as to where I was, so while I was in Palm Springs Mr. Vanderbilt had gone to the house in California. He had come in and he called me in Palm Springs, and he said that I was down there with a man, that I was carrying on again. It became so hopeless, I said, "Neil, I was not. I mean I am here with the child and the nurse, and the maid, they are right here with me, I just cannot understand why you keep saying such things to me when you must know they are not true."

Then I asked him to please come down and join us and have a little rest and maybe he would feel better if we could just sit and talk things over. He said, no, he would not do that. I said, "Well, I will be back then in a couple of days," and I did. I drove back then about the next day or the following day after that phone conversation. So then we smoothed things over and everything seemed to be all right, and he left California again and came to New York, I believe.

Q. Where did you go from Palm Springs, Mrs. Vanderbilt?

A. Well, from Palm Springs I went back to Beverly Hills and Neil was there.

Q. And you returned with your daughter and the nurse at that time?

A. That's right; and then we talked and he seemed to calm down and he was all right. And then he went away sometime in early December.

Q. Now, did your husband then depart from California and go to New York or to the east?

A. Yes, early in December.

[fol. 84] Q. Now, did you receive a telegram from an attorney in New York in the month of December, 1950?

A. Yes.

Q. Is this the telegram that you received?

A. Yes.

Mr. Winsten: I offer it in evidence.

Mr. Rosenblatt: I object upon the ground that it is immaterial, irrelevant, incompetent, not binding in any way, shape, form or manner upon the defendant.

Mr. Winsten: Subject to connection.

Mr. Rosenblatt: It is complete hearsay.

Mr. Winsten: It will be connected and I consent it be stricken if it is not connected.

Mr. Rosenblatt: I object to it being received at all.

Mr. Winsten: I will have it marked for identification, if your Honor please.

The Court: All right, mark it for identification.

(Paper marked Plaintiff's Exhibit 2 for Identification.)

Q. After you got the telegram, which is Plaintiff's Exhibit 2 for Identification, where did you go?

A. To New York.

Q. And whom did you see when you arrived here?

A. Well, I first saw Mr. Josephs. He met me at the Airport.

Q. Are you referring to an attorney by the name of Josephs?

A. Yes.

Q. And what did you do after Mr. Joseph met you?

A. We went to 1048 Fifth Avenue.

Q. And what happened after that?

A. He said that Neil——

[fol. 85] Mr. Rosenblatt: Now, may it please the Court I will object.

The Court: Objection sustained.

Q. Mrs. Vanderbilt, you are not permitted to indicate what was said. Did you have a conversation with Mr. Josephs?

A. Yes.

Q. And how long did that conversation last?

A. Oh, about two hours.

Q. And that was at 1048 Fifth Avenue?

A. Yes.

Q. Was the defendant present at that time?

A. No.

Q. When did you next see the defendant?

A. The following day or the day after.

Q. And where did you see him?

A. At 1048 Fifth Avenue.

Q. Did you have a talk with the defendant?

A. Yes.

Mr. Rosenblatt: May I have the time fixed?

Mr. Winsten: This is the following day after she was met at the Airport.

Mr. Rosenblatt: I don't know what date that was even.

The Court: He means the month and year.

Mr. Rosenblatt: That's right, your Honor.

Q. What month was that, madame?

A. It was December, and I believe I arrived here about the 13th or 14th, in there.

Mr. Rosenblatt: Is that 1950, your Honor?

The Court: Is that 1950?

The Witness: Yes.

[fol. 86] Q. If it will help you refresh your recollection as to the date, Plaintiff's Exhibit 2 for Identification is dated December 12, 1950. Now can you give us, is it possible for you to give us the precise date of your arrival in New York?

A. The 13th or the 14th, I would say.

Q. And then you had this talk with Mr. Josephs, and then you saw the defendant one or two days after that, is that correct?

A. That is correct.

Q. Now, what was said to you, what did you say and what did the defendant say at the time?

A. We had a very long talk.

Q. I want you to give the Court as best as you can remember the entire substance of the conversation?

A. I said, "Neil"——

Mr. Rosenblatt: Were there any other people present? Can we fix that, your Honor?

Q. Was there anybody else present?

A. No. I said, "Neil, did you ask Mr. Josephs to discuss divorce with me?" He said, "Yes", he had. I said, "I cannot understand it. You indicated to me over the long distance telephone and in your letter that I was to come to New York to discuss the subject of you adopting my child. You so indicated to me in letters and in telegrams and over the telephone, and I am met with an absolute surprise and a complete reversal of everything that has gone before."

Q. Did you mention the telegram that you had got from Mr. Josephs?

A. Yes. I said, I told him that Mr. Josephs had wired that he would meet me. I met him. I expected to sit down and talk about an adoption. Everything that had been indicated to me as to why I was in New York was the subject of adoption, and I met with the subject of divorce, [fol. 87] which is completely divorced from everything that I had known, and why, what had happened?

Q. Did you ask the defendant whether this telegram, Plaintiff's Exhibit 2 in evidence, was sent to you?

Mr. Rosenblatt: Exhibit 2 in evidence?

Mr. Winsten: Exhibit 2 for identification. I withdraw the question.

Q. Did you ask the defendant whether he knew anything about Plaintiff's Exhibit 2 for Identification?

A. I am sorry, Mr. Winsten, I don't understand.

Q. Did you ask Mr. Vanderbilt whether he knew anything about Plaintiff's Exhibit 2 for identification?

A. Well, yes, that's what I am saying. I am saying——

Q. I want you to specifically address yourself to this telegram if that was a subject of discussion between you, and tell us what was said with respect to that telegram.

A. Yes. This telegram says I am here to discuss the matter——

Mr. Rosenblatt: I object.

The Court: Objection sustained.

Q. Don't tell us what the telegram says. Tell us what you said to the defendant and what the defendant said to you with respect to that telegram.

A. Yes. I told him the whole subject that had gone on——

The Court: You have to tell us what you said and you must tell us what he said to you, if anything, madam. You say that you met him the next day?

The Witness: Yes.

[fol. 88] The Court: And you discussed the attorney's conversation with him?

The Witness: Yes.

The Court: Tell us what you said to him and what he said to you.

The Witness: All right. I said, "Neil, you have said to me over the telephone and you have written me and you have wired me that you are going to adopt Nanette, you are going to do it in New York, I am to see Mr. Josephs, all to adopt the child, you want to adopt the child. Mr. Josephs' wire indicated to me that that was the subject of my being here."

The Court: You said that to him?

The Witness: Yes.

The Court: What did he say?

The Witness: He said, "I know, but I have changed my mind." I said, "Well, please let me know ahead of time. I am met by a man who is an attorney and he tells me that you want a divorce, and I have absolutely no preparation for such a thing when I am completely prepared to talk about adoption and you want me now to talk about divorce. You jump from one subject to another and your

attitude changes so often that I just don't know where I am."

So then finally we talked it all over, and he said, "Well, we will try over again and everything would be all right." So then everything was all right again except I want to say that there was an incident during the same time that I was here in New York when I overheard him——

Mr. Rosenblatt: May it please your Honor, I was waiting very patiently for the conclusion of that conversation. I understand that the conversation was finished.

[fol. 89]

The Court: Was that the end of the conversation?

Mr. Rosenblatt: Was that the end of the conversation?

Q. Was that the end of the conversation, madam?

A. Well, there was a lot that—it was a long——

Q. How long did it last, this conversation?

Mr. Rosenblatt: She said two hours before.

Mr. Winsten: I didn't hear it, Mr. Rosenblatt.

The Witness: No. My talk with Mr. Joseph lasted about two hours, and then Mr. Vanderbilt and I actually discussed this whole thing—well, I was here for several days, but this original conversation took almost all of one day. There is a lot here. I reminded him how close we had been, we have known each other for a year and a half before we were married——

Mr. Rosenblatt: May it please your Honor——

Mr. Winsten: Just a moment. This is part of the conversation, and you are getting it now.

The Court: Counsel wants to say something.

Mr. Rosenblatt: May it please your Honor, the witness has testified that at the conclusion of the conversation they were going to try things over, or something like that, and

[fol. 90]

everything was all right. Now on that basis of that statement I move to strike all this testimony out in regard to this conversation which supposedly took place between her and her husband for the better part of a day.

Mr. Winsten: And my next question was that the entire conversation.

The Court: All right, let's find out.

Q. Did you give us the entire convers--ion that you had with the defendant that lasted the better part of a day, as you testified?

A. Well, many things were discussed.

Q. Well, tell the Court what was discussed. That's what we are interested in, Mrs. Vanderbilt.

A. How we could arrive at the point in our marriage, we meant so much to each other, and this whole, almost this whole year of 1950 was distressing me to the point where I just did not think I could stand it any more.

Mr. Rosenblatt: I would like to know if that is what she told Mr. Vanderbilt, as part of the conversation.

Mr. Winsten: I assume it is.

Mr. Rosenblatt: Well, let the witness tell you. May I ask the witness to say that?

The Court: Was that what you were telling your husband, madam?

The Witness: Yes, sir.

The Court: Tell us what he said and what you said.

The Witness: I told him, I said, "We have to arriv. at an understanding and at least attempt to get back to the periods when we were getting along. We were helping [fol. 91] each other, and this marriage was fine. But now, I don't know. All year long,"—one day he would be one way and the next day the next, or even in the space of an hour's time everything would be fine, he loved and adored me, and he loved my child, and he was going to adopt her, and everything was up and down, and he was hurting me.

The Court: What did he say?

The Witness: Sir, he was very quiet and he was all right. When I finished talking to him he was all right. He seemed to see what I was trying to drive at. I said, "I can have no more accusations against me, and please to keep me informed and talk things over with me, not to send this strange man to talk to me, and please, no more accusations, and this would have to be the way the marriage would go forward."

Q. And what did he say to that?

A. He said, All right, that he would try. He said I would have to—I am sorry——

Q. Would you like a few minutes recess, Mrs. Vanderbilt?

The Court: Do you want to continue or take a recess now.

The Witness: A recess.

The Court: The Court will take a five-minute recess.

(At this point there was a short recess.)

[fol. 92] (After recess.)

Mr. Winsten: At this time, Mr. McCoy, the receiver, is here, if your Honor please, and he will not be available as a witness, but he has prepared an affidavit concerning assets and property that he has in his custody, and I would like to offer that affidavit in evidence in lieu of his testimony. A copy of it has been given to Mr. Rosenblatt and I understand there is no objection.

Mr. McCoy: I have the affidavit here, your Honor. I think I should give a copy to Mr. Rosenblatt and also to Mr. Winsten.

The Court: If there is no objection.

Mr. Winsten: Will counsel stipulate that if Mr. McCoy were called as a witness he would testify to the information contained in this affidavit which I now offer in evidence.

Mr. Rosenblatt: I will so stipulate, subject of course to any corrections that I might want to find.

Mr. Winsten: Naturally.

Mr. Rosenblatt: And subject to his being called as a witness should that be necessary, or a further affidavit secured.

Mr. Winsten: That qualification is satisfactory to me.

Mr. Rosenblatt: And all of this is subject to my previously taking exception that such testimony is incompetent, irrelevant and immaterial unless and until the plaintiff has first discharged the duty and obligation of proving that the Nevada decree has no validity.

(Paper received in evidence and marked Plaintiff's Exhibit 3.)

[fol. 93] Q. Now at the time you were in New York and had this conversation with Mr. Vanderbilt, how long did you remain at 1048 Fifth Avenue?

A. Several days. I don't know how many days I was here, but it was over

Q. Did you while you were there overhear the defendant talking to anybody on the telephone?

A. Well, one day I was going into his room to get something from his bathroom. The door was closed, but I could hear him over the telephone.

Q. What did you hear him say, if anything?

A. What I heard were my own words in a note that I had written to him. I stood there outside of the door completely stunned.

Q. What did you hear the defendant say at that time? Will you please tell the Court what you heard?

The Court: Was that at the 5th Avenue home?

The Witness: Yes.

The Court: All right.

The Witness: It was a love note that I had written to him the night before and slipped under his door, and I heard him read the whole thing. I don't remember too much what it was. It just was something I had written to him and then he finished the note and I heard him say, "What do you suppose she is up to now? What does she want now?"

Then I opened the door and walked through and directly into the bathroom and got what I was after and came out, and as I had walked through he was on the telephone and when I came back he was off, and he said to me, "Sit down for a minute."

[fol. 94] So I sat, I said, "Well all right, Neil." I was completely shaken, and I said, "Neil, who were you talking to?"

And he said, "I was talking to Mr. Josephs," and he started talking about something else.

And I said, "Neil, you were reading a love note of mine to Mr. Josephs on the telephone and I don't like it, and I don't like the remark that you made, 'What is she up to now.'"

I said, "Neil, you must understand that I love you and you say you love me, and yesterday or the day before everything was smoothed out between us, and then you read a love note of mine, personal things between us to this lawyer over the telephone."

I said to him, "Please, I cannot have it, you must not do it."

So I said, "If I am to write to you, and I want to, I cannot let myself know that the words I say to you are then told to this man."

Q. And what did the defendant say to that, Mrs. Vanderbilt?

A. Well, he just said that he did not see any harm in it, and he started to laugh and giggle about the whole thing, and I said, "Neil, please, you have to promise me, you are away so much, I want to write to you, but I don't feel that I can if this is the thing that is going to go on."

So he said, "Don't be silly; don't be silly; don't be silly," and that was about it.

Q. Now, when you left 1048 Fifth Avenue did you return to California?

A. I went to California, yes.

Q. Did the defendant accompany you at that time?

A. We were both there for Christmas, and I cannot recall whether we went actually together.

[fol. 95] Q. You were both where for Christmas?

A. Both in California for that Christmas.

Q. That was the Christmas of 1950, is that correct?

A. Yes.

Q. Now, did you return to New York in February of 1951?

A. Yes, I did.

Q. How did you happen to go to New York at that time?

A. Well, you see, Neil had left after the holidays, he had left California, and I was there then alone in the house with the child, and we were in almost daily contact over the telephone, and a lot of letters and things, and I had expected Neil, he had told me definitely that he was to be there early in February, and then over the telephone he said that he changed all of his plans now, and that he was not going to be with me, and I said, "But Neil, you have lectures scheduled as far as you have told me, on the West Coast and in California, in the western states. Now, why aren't you to be there?"

"Well, I have changed everything."

I said, "Well, I don't understand it. What are you going to do about the lectures and what is keeping you in New York?"

"Well, I just want to stay here."

So then——

Q. During the period of February—I withdraw that. Please continue. You came to New York sometime in February of 1951?

A. Well, yes. He had sent—I had sent him a telegram, and I said, "Neil, I had expected you here," and then he had sent me a telegram saying, "Well, I had expected you here in New York in my home, and with my mother, and I am very disappointed that you were not here."

[fol. 96] Well, this was the first that I had heard that he had expected me in New York at all, so all that night after receiving this telegram I was awake all night, and finally about two A. M. I just made up my mind that I would go to New York. He expected me there, he says now, now his mind was completely changed again, if he wants me in New York, I will go to New York, and I packed and my daughter and I then caught a plane about 9:00 A. M. and left California and came to New York.

Q. Now, how long did you stay in New York at that time?

A. I would say about two weeks or so.

Q. And how were your relations with the defendant at this time?

A. Well, he was very surprised that I had come to New York, and presumably—I just told him, I said, "Neil, just now I have a telegram here, right here, you want me here, and I am here. I am trying to do the things you say you want me to do," and everything was sort of all right during that period, and I think we looked at the storage and apartments, or something. We started talking about getting an apartment in New York, because we were going to give up the California place.

Q. How long did you stay here?

A. About two weeks that time.

Q. Now, about that time or the following month, did the defendant make any accusations?

A. Yes. In California my brother was there again——

Q. What happened then, please, and when did it take place?

A. Well, he said that he wanted to go to Europe alone this coming summer.

Q. Was he there in California at that time?

A. Yes.

Q. Fix the time, please.

A. Well, I would say about March or April. You know, first of all, I had told him that I would go on the lectures [fol. 97] with him through the western states, so then he arrived in California and he lectured somewhere around Bakersfield, and I drove with him, and then we went to—I cannot think of the name of it—but anyway, we spent a few days along the seacoast after this particular lecture, and during that time, that week or so that we were there—I am sorry, I keep trying to think of the name of the place—anyway, it was during that time he was drinking quite heavily, and he started in another long accusation, long hours of going back over all these various men that he was accusing me of.

Q. And who did he specifically refer to?

A. The dancing teacher and someone in the Democratic Headquarters, and then he mentioned another man, a senator, whom I did not even know.

Q. Were any of these accusations true, madam?

A. No.

Q. And what did you say to him during this discussion or dispute?

A. Well, I pointed out to him again that none of it was true, and that I felt in view of the fact that he was always so nervous and so overwrought and complaining about the lectures and how the lectures were going, that wouldn't it be much better to save our marriage if he took some time and did not lecture for a while, and that we could then be together more the way we used to be, and maybe I could, if we could stay together, close together,—maybe he would not be so nervous all of the time, and his doctors had said that it was too much for him, and he said it was too much for him. I told him that I believed that it was his nervousness and the things that were weighing on his mind that made him turn against me this way, and that he knew and I knew that he knew that there was nothing to any of these [fol. 98] accusations. Well, then, finally, over this period we then arrived at amicable relations again and we went back to Beverly Hills.

Q. And what happened then, Mrs. Vanderbilt?

A. Well, you see, we were going to go—we were talking a great deal about the European trip, and every now and then he would say that he wanted to go alone, because he judged from the '49 trip, the 1949 trip, that it was terribly difficult to travel with four of us in a car, and he wanted to move terribly fast, and take all the pictures and gather all the material, and he felt that he could do it much better alone, and I said, "No, I did not want him to go alone, that we had to go together because this was going to be over a period of several months," and then he would say, "It is very odd that you want to go with me. You know you have all these men, these boy friends."

The Court: Did you go to Europe, yes or no?

The Witness: Yes, I did.

The Court: Counsel, you will have to lead your witness a little, so that we can finish this case. It is moving too slowly.

Q. Did you finally make plans to go to Europe together?

A. Yes.

Q. When did you leave for Europe?

A. Well, we were here in New York some time before we went to Europe, and I think it was April or May that we went.

Q. Sometime in the month of May, 1951, you left for Europe?

A. Yes, I think so.

Q. Now, who went to Europe at the time? What was the party, who was the party composed of?

[fol. 99] A. Well, Neil and Nanette and I, and then the nurse maid was in Europe and they traveled with us.

Q. Did you go to Spain in your travels at that time?

A. Yes.

Q. Did an incident occur in Spain as a result of which there was a quarrel or dispute between you and the defendant?

A. Yes.

Q. Tell us what that was and when that was?

Mr. Rosenblatt: And where?

A. Well, I guess this will be June of 1951, sometime in June, I am not too sure of when we finally got into Spain.

but it was in Madrid and it was directly following a party at the Embassy, and on what day I cannot tell you that was.

Q. Tell us the incident, please.

A. Yes. We went to a cocktail party at the Embassy, and we had been there for about two hours, and then we left the party, and the minute we left Neil said to me, "I do not like your sitting and talking to one man so long at a party."

And I said, "Neil, I knew no one at that party, and the Ambassador was kind enough to sit with me and talk to me and tell me what he thought I should see in Madrid, and he was exceedingly nice and charming. Now, I don't understand what is wrong with it. You were right there. It was a crowded party, lots of people. What is wrong?"

He would say, "You could not possibly be talking only about what to see in Madrid for that length of time."

I said, "Well, there may have been other things to the conversation, but that was mainly it. He was a charming man. He is supposed to be a friend of yours. Now, what [fol. 100] is the matter with it? I mean, I don't understand. You have known me for so long; you knew me for a long time before we were married. I conduct myself no differently now than I did then. Why is what I do now wrong and was not wrong earlier in our relationship?"

So then he kept it up through dinner. We went to dinner and he kept this up through dinner, and I said, "Neil, what do you want to do? Do you want to set down rules and regulations as to how I conduct myself?"

I said, "You always tell me that businesswise all of these things are very important to you. You are in Spain attempting to get cooperation in order to make these films. Am I to be rude to the Ambassador? *How*, what am I to do?"

We left dinner and went back to the hotel, and he kept it up for a whole longer, until finally he pushed me down again on the bed. I told him that I absolutely refused to discuss something that I did not know what it was all about. Why was I being attacked? He was not making it clear to me what he expected of me. On the one hand, businesswise I was to be good and charming to these people that he needed in a business fashion; and on the other hand I

was being condemned for it, and I would no longer discuss it, and eventually we went to sleep.

The Court: We will suspend now. Step down.

(Conference between the Court and counsel at the bench.)

(Whereupon the trial was adjourned to the following day, January 11, 1955, at 10:00 o'clock A. M.)

[fol. 101] New York, N. Y., January 11, 1955

Trial Continued

* * * * * * *

PATRICIA VANDERBILT resumed:

Direct examination.

By Mr. Winsten (continued):

Q. Mrs. Vanderbilt, you told us yesterday that you came to New York after receiving Plaintiff's Exhibit 2 for Identification, is that correct? I show you this telegram and ask you about when did you receive that telegram with respect to Plaintiff's Exhibit 2 for Identification?

A. I received it the same day.

Q. And whom was that from?

A. This is from my husband.

Mr. Winsten: I offer it in evidence.

Mr. Rosenblatt: I have my exception to all the introduction of these papers, your Honor.

The Court: Is your objection based upon the ground there is no proper foundation laid for this telegram or is this the general objection that you made?

Mr. Rosenblatt: This is a general objection on the grounds stated yesterday and which appear in the record.

(Received in evidence and marked Plaintiff's Exhibit 4.)

[fol. 102] Q. Now who is "Earl" that is referred to in this telegram, Plaintiff's Exhibit 4?

A. My first husband.

Q. And who is "Bunny" that is referred to in Plaintiff's Exhibit 4?

A. That is Nanette, my daughter.

The Court: Whom did you say Earl was?

The Witness: My first husband, Nanette's father.

Q. Now, you were telling us yesterday, Mrs. Vanderbilt, about an incident that occurred in Madrid in the month of June, 1951. Now after that incident following the party at the Embassy in Madrid, did anything else occur at Madrid?

A. Yes. About two days later Neil said that someone from the Embassy had called, one of the Ambassador's assistants, and that he wanted to take us and show us the night life of Madrid, and he wanted to take us late to see the Flamenco Dancers out of town that start very late at night after 1:00 o'clock, and I was delighted. I said, yes, I would like very much to go, and he said, "Why are you so anxious to go? When you have been gone all day have you seen the Ambassador and have you seen the person that has called?"

And I said, "No, I have not seen anybody," that I had gone around looking into the shops and shopping, and that was all. "However, I would very much like to see all of these things."

Anyway, he said he felt that I just wanted to see this man.

I said, "This man I don't know. He is a life-long friend of yours, Neil. He was raised with you. You have known him all of your life. I don't know him at all, and he wants [fol. 103] to take us. This is his town. Why can't we go?"

By this time he said he would not go at all. So finally I just decided that it was useless and we never did go, we never did go at all.

Q. Now, after you left Spain did you go to the Duchy of Luxembourg or the Principality of Luxembourg?

A. Well, finally through France, Switzerland and Germany we did.

Q. Were you driving with the defendant at the time there was an automobile accident in Luxembourg?

A. Yes, I was in the car.

Q. And did you sustain any injuries as the result of that accident?

A. I was thrown. I had no visible injuries.

Q. Did you experience any pain or discomfort as a result of that accident?

A. Yes. My back felt badly and I felt very shaky and shocked.

Q. What did you do after that accident, where did you go?

A. Well, a doctor in Luxembourg that was sent to see me by Mrs. Mesta and from the Legation, he could not treat me because we were on our way to Paris, but he said that I should have X-rays.

Q. Did you go to Paris after that?

A. Yes.

Q. How did you go to Paris? How did you travel to Paris, I should say?

A. I went by train with Nanette and the nurse.

Q. And how did the defendant go to Paris?

A. He drove.

Q. Did you subsequently meet the defendant in Paris?

A. Yes.

Q. Did you receive any medical attention in Paris?

A. Yes. We both went to the American Hospital in Paris and had X-rays—I had X-rays taken of my spine, and Neil had X-rays taken of his wrist, and the doctor there [fol. 104] told me that from the X-rays he thought I should have some back manipulation, he could not see anything specific in the X-rays.

Q. Did you subsequently go to a doctor at Paris after the hospital?

A. Yes, I went with Neil to a French doctor.

Q. Now, did you receive any treatment at this physician's office?

A. Yes. Neil and I both went into the back room and I undressed and the doctor manipulated and massaged my back.

Q. Now, did the defendant have anything to say to you at the doctor's office or after you left the doctor's office, and if so, what did he say?

A. Going down in the elevator he said that I should not go back there.

I said, "Neil, the doctor seems to think I should have a couple of more treatments before we sail for America."

He said, "I won't permit you to go back there. He is a male doctor. He is away up in that building and anything can happen."

Q. Will you please continue, Mrs. Vanderbilt?

A. I said, "Neil, I don't understand what your objection is. If I need care, and I do feel badly, I do not understand why you don't want me to do it."

He said, "Well, he is a Frenchman, he is a very young man, and something might happen."

I said, "Neil, I will take the nurse and Nanette with me,"—because Neil was going to England, he could not go with me—"I will take the nurse and I will take the child, what can possibly be wrong with that?"

"No, no, no, you can't go there."

So then I said, "All right, I won't go."

Q. Now, did you subsequently take the S/S America on [fol. 105] your way to New York?

A. Yes.

Q. And when did you embark on that ship?

A. Sometime in August, towards the middle of August.

Q. What year, 1951?

A. That's right.

Q. Now did an incident occur on that ship while you were on your way to New York, Mrs. Vanderbilt?

A. Yes.

Q. When did it happen, about what day of the voyage, would you say?

A. About the third day, the third night.

Q. Well, tell the Court what occurred at that time?

A. On this evening we had had sort of a party for the children aboard, and my daughter. Then after they were put to bed we then went back to the ballroom with some people and there was dancing and I was not feeling well, it was extremely humid and very still. As it grew later I asked Neil, "Please let us go to sleep, I don't feel well, let us go down."

And he said, "Oh, no, we are having a very good time."

I said, "All right."

Twice I asked him to leave, and he said, no. So then finally, very late, about 1:00, we did all leave. We went

into the cabin. I prepared for bed, and he did. There was practically nothing said at all. Eventually he was already in bed and I got into bed—two beds—and I said good night to him.

For the next hour or so he kept turning the light off and on and getting up and down, going into the bathroom, coming back, putting on his glasses, taking them off, putting them in the case and snapping the case. I could not sleep.

After some time I said, "Neil, please, I am very tired."

"It's all right."

[fol. 106] But he continued doing this, he would turn the light on again and then he would start to read and make a lot of noise with the book, the pages, and then he would put that away and shut the light out again.

Then he started to grunt. He makes a noise on certain occasions——

Mr. Rosenblatt: May I have the word?

Mr. Winsten: Grunt.

The Court: Grunt.

Mr. Rosenblatt: Thank you.

A. (Continuing) Anyway, I could not sleep, so I got up. This is after an hour or more. I got up, took the pillow and one of the blankets and said, "I am going to sleep in the sitting room."

I went into the sitting room and started to fix the settee in there. He came rushing after me and said, "Don't be silly, don't be silly. Come back in here."

I said, "I will, Neil, if you will please be quiet. I cannot sleep. The noises that you are making are disturbing me."

He said, "All right, all right."

So I took the blanket and he took the pillow. I went back into the bedroom and he came behind me. As I was putting the blanket on the bed he threw the pillow and it hit me in the back of the head.

So I said, "I am sorry, it is just too much. I am going to go and sleep with Nanette and the nurse," and I went then around into the bathroom. He came then and rushed in after me, and he grabbed me from behind, swung me around and shook me, and then he threw me. Well——

[fol. 107] The Court: What do you mean, he threw you?

The Witness: He threw me, sir.

Q. Where did you land? From where to where, the Court wants to know.

A. You see, I must have not known anything for a whole because then when I became aware I was crosswise in the bath tub. My legs were here, and my head was up here against this other side, the wall side of the bath tub, and Neil was not—I noticed that he was not there, he was not in the bathroom. So I managed to pull myself out of the bath tub, and I went out of the bathroom, and as I got out of the door I saw him by the porthole in the sitting room. I went through the bedroom and I could see part of his face, and he was fooling with the porthole. He did not look like the man that I knew at all. He was completely white. I was frightened, so I turned and went out the hallway, out into the hall of the ship, and I went down two doors to my daughter's cabin, and banged on the door. The nurse opened the door and then she shut it again and I banged and screamed again, and she opened it just a crack and said, "You are bleeding, you will frighten the child."

I said, "All right," she was right. She shut the door again, and then I just stood there and I put my hands up and I was bleeding all over. I only had a nightgown on and the blood was all over the floor and all over me, and then there appeared a steward, or something, anyway he was a ship's man.

The Court: Where were you bleeding from, madam?

The Witness: It was all around my neck.

[fol. 108] The Court: Where was the blood coming from?

The Witness: I did not know at the time. I did not know until later.

Q. Did you eventually find where it was coming from?

A. Yes.

Q. Where was it coming from?

A. From the back of my head.

Q. When you saw this steward, what happened?

A. I said, "Please get me a doctor, I need help." He just stood there and he looked at me.

The Court: Did he get a doctor?

The Witness: Yes, he did, I guess somebody did.

Q. Were you taken or did you go to the surgeon of the ship?

A. He left me and then I walked down a few doors to where I remember I had seen a doctor's office sign, and I went and sat in there alone, and eventually a nurse came, and eventually the doctor, and he proceeded then to take care of the wound on the back of my head.

Q. What did he do to your wound, if anything?

A. Well, he cleansed it and sewed it.

Q. Were there sutures taken in your scalp?

A. Yes.

Q. Will you indicate the part of the head where the sutures were?

A. Right in here.

Q. Indicating the rear of the head.

The Court: What year was this?

Mr. Winsten: 1951.

Q. And what happened after the doctor treated you?

A. He put me in the ship's hospital way below.

[fol. 109] Q. How long did you stay in the ship's hospital?

A. I went to sleep and then I stayed there all that day, and then that night, and then sometime the next day I went back to the suite.

Q. Was anything else done to you while you were in the hospital by the physician or the nurse?

A. Well, yes, they gave me medication.

Q. Did the defendant come to visit you while you were in the hospital of the ship?

A. Yes, that day when I was awake, shortly after I awakened he came in to see me.

Q. Was anything said by either of you at that time?

A. Yes. He sat in the chair at the foot of the bed and he said, "Do you want to marry the guy?"

I was upset and I——

The Court: Who was he referring to, did he tell you?

The Witness: I did not even know at that time.

The Court: Didn't you ask him?

The Witness: I said, "Neil, I don't know what you are talking about."

He says, "You know."

And I said, "No, I don't know." I said, "Please, if you have anything on your mind, you must come right out and say."

And he said, well, it was this man who had been in the party the night before.

The Court: What man?

The Witness: A newspaper man, sir.

The Court: Look, counsel, you better lead your witness, I cannot do it.

Mr. Winsten: Is the Court interested in knowing the identity of the man?

[fol. 110] The Court: No, but you are talking about something and I want to know what it is all about. I am not interested in the identity, but I do want to know the facts.

Q. Was there a man on the ship that he was referring to?

A. Yes.

Q. And was that man at a party on the ship previous to that day?

A. Yes.

Q. Well, cont-nue with this conversation, madam.

A. I told him he was utterly rediculous and that I could not stand to listen to it, and at this point I had been pressing the buzzer all along. The nurse came in and I said, "Please, you must ask him to leave, he is upsetting me in the extreme and I cannot stand it," and she said that he would have to leave then.

Q. Now, did you see the defendant again while you were in the hospital on that occasion?

A. Well, he came down all dressed, yes, for the Captain's dinner, that's all. I would not say anything, my daughter was with me.

Q. Now when the ship docked, how did you leave the ship and where did you go?

A. Mrs. Van Name took me and my daughter in the limousine to 1048 Fifth Avenue.

Q. Who is Mrs. Van Name?

A. She was Mrs. Vanderbilt's fiscal secretary.

Q. Meaning the defendant's mother when you refer to Mrs. Vanderbilt?

A. Yes.

Q. Did the defendant accompany you to 1048 Fifth Avenue on that occasion?

A. No, he remained at the dock.

Q. When you got to 1048 Fifth Avenue, what did you do?

A. I went to bed, and then eventually later that day a doctor was called by some member of the family, and then [fol. 111] I proceeded from then on to see this doctor. Finally the same day, much later, Neil came in and he wants to know what I was going to do.

I said, "Neil, I cannot discuss it now. I must think. I have an awful lot of thinking to do. Please give me time to think it all over."

And he said, "All right."

Q. Now, how long did you continue to receive medical treatment at 1048 Fifth Avenue?

A. All the time that I was there.

The Court: How long were you there?

The Witness: Until mid-January 1952.

Q. And was there more than one physician that treated you there?

A. Yes. A bone specialist was then called in and he treated me and gave me therapy, took X-rays.

Q. And what particular part of your body was involved?

A. My neck. From his X-rays he discovered that there was neck injury and he ordered a collar for me to wear.

Mr. Rosenblatt: Now may we have the name of the doctor, please?

Mr. Winsten: Yes.

Q. Do you recall the name of the doctor?

A. Yes, that is Robert Patterson.

Q. And do you recall the name of the other physicians that were treating you at that time?

A. I do not recall the name of the original ones. I did not get much to do with him. He was the Vanderbilt family doctor and he called in this Dr. Patterson.

[fol. 112] Q. Now, did Dr. Patterson have this collar, orthopedic collar, made for you?

A. Yes.

Q. And did he bring it to you at 1048 Avenue?

A. Yes. He came to see me almost daily.

Q. Now, have you had occasion—how long did you continue to wear that collar, madam?

A. Off and on ever since; but you see I had a severe

concussion and that is why he was so concerned. He was afraid that I had a skull fracture.

Q. Did you experience any pain or discomfort in your head at that time?

A. Oh, yes. I had terrible waves which would come over me, and severe headaches, and my vision was bad.

Q. How long did that continue, how long did that condition continue acutely, madam?

A. For at least two years.

Q. Now did you continue—how long did you continue to wear the orthopedic collar, Mrs. Vanderbilt?

A. Well, I have worn one off and on ever since.

Q. And what is the purpose of your wearing that collar?

A. There is something wrong with the discs in the neck and I have nerve root irritation and what all.

Q. Are you wearing that collar today?

A. Yes, I have it on now.

Q. Will you please show it to the Court?

A. (The witness indicates.)

The Court: All right.

Q. Now, sometime in January when you were still at 1048 Fifth Avenue did you have occasion to have a long talk with the defendant?

A. Not in January.

Q. When? Will you fix the time, please?

A. You see, I had asked Neil to wait, to give me [fol. 113] time to collect myself, and then you see we had an anniversary on September 7th.

Q. Yes.

A. And he was very nice, he wrote me an awfully sweet note, and said that the first three years was the hardest and there was something we could go on from there, and then finally—I mean, he asked me a couple of times over a period of about three weeks was I ready to talk to him, did I know what I was going to do.

I said, "A little more time," and eventually I said, "Neil, I do think now I know what everything is all about, and I do think that now we can talk," so one evening——

Mr. Rosenblatt: May we have the time fixed again, please, and the place.

Mr. Winsten: The place is 1048 Fifth Avenue, I presume.

Mr. Rosenblatt: Well, let's ask her.

The Witness: It is.

Q. All right. About when would you fix the time, Mrs. Vanderbilt?

A. Well, it is about four weeks after we landed.

Q. That is sometime in October, then, of 1951, is that correct?

A. It would be the latter part of September.

Q. All right. Now, go on, please.

A. Well, we had this long talk.

The Court: Mrs. Vanderbilt, suppose you sit back and relax and speak a little louder. Now, go ahead.

A. (Continuing) I said, "Neil, I think now I have everything figured out. I have come to certain conclusions. Please try to help me understand."

[fol. 114] I said, "I want to take you back, I must do it."

He sat and was very quiet, and I told him then about our life as it appeared to me, and the change that had come over him, and I told him that now and for several months last past I had known of his medical condition and I knew now that he had some mental problems, and that to myself I was saying that this was the reason he was attacking me. Now was this true? Is it because of his extreme nervousness and hypertension and all of these other things that were in his medical reports, the conclusions as to his mental condition, was this the reason, and if so, would he please now see the man that he trusted, Dr. Prandoni, in Washington, and I would go with him, I would go with him if he wished, or he must go alone. I was overwhelmingly concerned because of my child. I said, "Neil, you know Nanette and I are very close"——

Mr. Rosenblatt: May I move to strike out the reference to the child.

The Court: Is that what you told him?

The Witness: Sir?

The Court: Is that what you told him?

The Witness: Yes, sir.

The Court: All right, go ahead.

A. (Continuing) I said, "Neil, you love Nanette and I love Nanette. I am being completely broken down physically. I feel extremely distressed for her and for you."

I said, "I feel so terrible physically,"——

Q. The Judge cannot hear you when you put your hands to your mouth.

A. He must know that he could possibly have killed me [fol. 115] on the boat and what would this do to the child, not only to the child but to him, what could happen.

And he started to cry. He cried for about two hours, and I just kept talking and talking, and I said, "Neil, you must, you must promise me to do this thing, to see Dr. Prandoni, he can help you, he can recommend who can help you, because you are taking things out on me that"——

(The witness weeps.)

Mr. Rosenblatt: I cannot hear a word.

Mr. Winsten: May we have a few minutes, Judge?

The Court: Does she want some time?

Mr. Winsten: Do you want a short recess?

The Witness: No.

The Court: Go ahead.

Mr. Rosenblatt: May I have the last statement read back?

(The last part of the last answer of the witness was repeated by the court stenographer.)

The Court: Go ahead.

A. (Continuing) Well, sir, I talked for a long time and I told him that I had noticed his hatred for so many people. This did not appear right, and there were so many groups of people over this period of time that we had been married, and now I was putting things together and as to why he had changed so radically towards me, and he was becoming a man that I did not know and it was having a terrible effect on me, and was going to have an effect on the child.

[fol. 116] The Court: What did he say? Did he say anything to all this?

The Witness: Sir, he was crying most of the time.

The Court: What else did he say besides crying?

The Witness: Towards the end he promised me that he would try——

The Court: Try what?

The Witness: To not distress me, sir. During all of this I had told him how ill I felt and how hard it was for

me, because my headaches were so very bad, and I just could not see how I could physically go on under such pressure. He promised me at the end that he would see Dr. Prandoni.

The Court: All right, what else happened after that?

Q. Was anything else said at that time, Mrs. Vanderbilt?

A. Well, there was a lot said. That was the main——

Q. Have you given us the substance of what was said?

A. Yes.

Q. How did the conversation end? On what note, or what statement was made by either you or by Mr. Vanderbilt?

A. His promise to see Dr. Prandoni in an attempt to get things straightened out in his mind.

Q. What happened after then? How long did you remain at the Vanderbilt house at 1048 Fifth Avenue?

A. Until about mid-January of the next year, 1952.

The Court: And he stayed with you during that time?

[fol. 117] The Witness: Yes, sir.

The Court: Did anything happen during that period?

The Witness: No.

The Court: What else happened after that?

Q. Where did you go when you left Fifth Avenue?

A. I went to Beverly Hills, California, to the Beverly Hills Hotel.

Q. How long did you stay there?

A. Oh, a couple of weeks.

The Court: With him?

The Witness: No, he was not there.

Q. Where did he go?

A. He was here in New York and I think he was lecturing too.

Q. Did he tell you when he would join you in California?

A. Sometimes in February.

Q. Did you take a house in February?

A. Yes, I did.

Q. You leased a house for how long?

A. Seven months.

Q. Where was that?

A. In Belle Air, Beverly Glen.

Q. Did the defendant come to Belle Air sometime in February, 1952?

A. Yes, he did.

Q. Tell us what occurred when the defendant was at Belle Air in February, 1952.

A. A couple of days after he got there, or the next day, in the hall closet, the guest closet at the front door, he found a hat, and he brought that to me and says, "Whose hat is this?"

I said, "I don't know."

"It is a man's hat," and he said, "Well, who has been here?"

[fol. 118] I said, "Very few people. I have only been in the house for two weeks. I had a gathering of about ten people that I knew, that is, couples, five couples, and that's all. Those are the only people that have been here, outside of servants."

He said, "You must know to whom the hat belongs."

"I don't know," I said, "it is possible it belongs to the owner of the house. They left many personal things in the house."

The Court: Did you rent the house furnished or unfurnished?

The Witness: It was completely furnished.

The Court: Why don't you get this testimony out of this witness, counsellor?

Q. Continue, please.

A. So then we dropped the subject of the hat for that time, but the hat kept coming up.

Q. Who mentioned the hat after that?

A. Neil.

Q. What did he say when he mentioned the hat?

A. Well, you see, the next time he had mentioned it, I had discovered whom it belong to. It belonged to one of the men who had been at this gathering that I had. I had been ta-king to his wife, and she said, "My husband left his hat, I will call for it sometime."

Q. And what was his name?

A. Mr. Craig.

Q. Where did they live?

A. In Beverly Hills.

Q. Can you tell us what happened subsequently with respect to the hat?

A. Well, yes. I told Neil, I said, "The hat belongs to Mr. Craig," and he says, "Oh, no, I don't think so." [fol. 119] So then I let it go, and we went to the Craig house one night for a large dinner party, about fifty or sixty people, with a sort of a buffet thing, about eight tables, and eight or ten people or so at each table, and there were place cards at this party, and I sat between two men, and about four or so other people at the table, and Neil was at another table. Anyway, later when we left this party, Neil said "What were you and he"—and he named the man on my left—he said, "What were you being so gay about with this man?"

I said, "We were talking about fishing in Honolulu."

He said, "That is absolutely impossible. You could not spend all that time talking about fishing, and what is there so gay about fishing?"

I said, "Neil, I spent most of my childhood fishing in the Hawaiian waters. I enjoy talking about it. This man went very often in his boat and fished. There is nothing wrong with that."

Q. Had you ever met this man before that evening?

A. Only once when I had picked up my child at the Craig's house at some prior time that we had been there. The Craig daughter and my daughter went to school together, and that's how I happened to know them, and she used to play there and I would pick her up, and then I was there late one day and it was a matter of an introduction at the door, that's all.

Q. Now, continue with this conversation with the defendant, please.

A. He said, "The hat is his, isn't it?"

Q. Referring to whom?

A. This man who had sat on my left at dinner.

Q. What did you say?

A. I said, "Neil, I told you that the hat belongs to Mr. Craig. It does not belong to this man. This man has never been in this house. I have only been in it a short time [fol. 120] and I know everybody that has been there. I don't know him. We had a pleasant evening, that's all, with a whole group of people at the table."

And then he kept pursuing things. He said, "Well, you leave the house and you are gone for several hours during the day"—and this and that and the other thing.

I said, "Neil, I have to shop. There are certain things that I do. I don't understand why you constantly are putting me on the defensive and attempting to make me account for what I do every minute of the day. I cannot do it."

Well, then, I believe—he was in and out so much during this time, I am trying to remember.

Q. Well, did there come a time or was it that day or the next day that he took the hat somewhere?

A. Yes. He had lectured in San Diego, and he went off and he took the hat with him. I said, "Neil, you cannot take that, because it belongs to Mr. Craig, and his wife said that she wants it back."

He said, "Don't be silly. It does not belong to Craig. It belongs to this other person."

I said, "Oh, Neil, please, I mean I am just at my wits' end. Take it; I don't care."

He took it and he never brought it back. So then, you see, my brother was in town, and he proceeded then in my presence to tell my brother that I had a new boy friend. So this was extremely distressing, and I said to Neil, I said, "Please, I don't know why you say these things to my brother."

And then Neil, while my brother was there, decided that he wanted to have a big party for a lot of business people, and so in the midst of all this, about the hat, he is arranging a party for a couple of weeks later, and he called [fol. 121] an awful lot of people. As a matter of fact, he called everybody except about six personal friends of mine, and one day he said to my brother, "I am asking a girl friend of mine, because Pat's boy friend is coming."

I said, "Neil, what do you mean?"

And he said, that he had asked this man who had been sitting on my left at this party at the Craigs'. I said, "Neil, you are accusing me of something with this man and then you ask him to a party. What are you trying to do?"

Anyway—I don't quite know where to go, because you see, he was in and out of town.

Q. Did an incident occur, Mrs. Vanderbilt, at the home of the Craigs about that time with respect to the hat?

A. Yes. This was another night that he had lectured in Pasadena and I was not going to go with him because I was going a couple of nights later to another one, and the Craigs had asked us both to dinner, and I said that I could come but Neil could not. So, anyway, Neil dropped me at the Craigs and they had their family there and that's all, it was a small gathering. Later, about 11:30 or 12:00 or so, Neil came into the house to call for me. He came in to their library, and the only people remaining were Mr. and Mrs. Craig and her mother, and another older woman who was a friend of the mother's, and Neil came in and he was offered a drink, and he stood there and he was drinking it, and then he said, "Who else was here? This is not all the people who were here for dinner."

He said this out to the Craigs, and they said, "Well, no, there were a couple of other people there, but they have gone."

I don't even remember who they were.

[fol. 122] Q. Was this man one of the people who were there that evening?

A. No. Then Neil said, "Was this man there," and he mentioned the same man, and they said, "No, Neil, he was not here."

And he said, "I believe he was."

And they repeated that he was not there, and then he said, "I believe that you people are sponsoring an affair between my wife and this man."

They were extremely shocked, and said, "Neil, you must be overwrought, there is no such thing going on."

And he said, "I want to see your husband's hat size."

And Mrs. Craig said, "All right," and she took him into the other part of the house, I guess the bedroom, and I stayed in the library, and then he eventually came out with her, and in the meantime I had gotten myself together, and I said, "Neil, will you not leave?" So we did, and in the automobile all the way back to the house we started in talking again. I said, "Neil, now are you satisfied about the hat? You have caused me extreme embarrassment with people that I like, with the parents of my daughter's

friend. I don't know whether they will ever speak to me again. Are you satisfied about the hat?"

"No, I am not."

I said, "Well, then, I can say no more. All of these people have said that it is the man's hat. You insist on looking at his hat size, and now you say you don't believe that it is his hat."

I said, "It does not make any sense to me. I don't know what more I can do."

And then he kept pursuing and he then started to go back and say he knew all of these different men in my life.

[fol. 123] Q. How long did this discussion continue that night, madam?

A. About two or three hours or more.

Q. And this continued after you returned to your home, is that right?

A. Yes.

Q. Now, did an incident occur that evening during the course of that discussion, or quarrel, concerning your rings?

A. Yes. Things were very heated between us, because I was upset, and I said, "I think I will go to bed," so I went into the bathroom and I was washing my face, and I had taken off my wedding and engagement rings and laid them on the basin while I creamed my face. He came in after me and he took them and he put them in his pocket, the pocket of his robe, and I said, "Neil, what are you doing?"

And he said, "You are not my wife, there is no reason for you to wear my rings."

So I followed him back into his bedroom and I said, "Neil, I think all of this has gone too far. You promised me before there would be no more."

So then——

(The witness weeps.)

Q. Will you please tell us, continue; tell us the rest of the conversation and what transpired that night?

A. I was making every attempt to be calm and he said something appalling about my child.

Q. Well, skip that reference.

Mr. Winsten: I prefer, your Honor, not to go into that, with the Court's permission.

The Court: Let's move along faster, counsellor.

[fol. 124] Q. What else did he say, please?

A. Well, everything became so upset, I finally, I called the child's aunt in Los Angeles and asked her if she would please speak to Neil and then he got on the telephone and he talked to her and I went into bed.

Q. Did the defendant say anything at this time about doing anything to you or disfiguring you in any way?

A. Several times.

Q. Tell the Court, please, and see if we can move along a little faster.

A. I am sorry. Several times during this period he had said that perhaps he should have finished the job on the boat, and then this night he said that—after he took the rings and we went back into his room, he said he was going to take all of my clothes and everything that he had given me, and that when he was through with me no one would want to look at me.

Q. Well, did anything occur the following day or several days thereafter with respect to your brother?

A. You see, then this next day he had a lecture in Santa Barbara, and when he left he said to me at the front door, "I will be back on Thursday to get my things and I am leaving after that."

And then, you see, he did then come back a couple of days later, but he did stay. You see, this is a very difficult period because he was in and out a great deal, and my brother was in twice from Alaska, and so it gets——

Q. Well, around that time, Mrs. Vanderbilt, was your brother at your house?

A. Yes.

Q. And did Mr. Vanderbilt have a discussion with him at your house?

A. Yes, both times when he was there.

Q. Did you hear any part of that discussion?

A. Well, the first time, you see, he kept telling my brother [fol. 125] that I had this new boy friend, and then he told me that he was invited to the party, and then the second

time my brother was there I heard them all one night in the other room and I could overhear——

The Court: What would you hear?

Q. What was he saying to your brother?

A. He was saying that it was the same thing, sir, that I was having all of these things with these men, I mean that I was being unfaithful to him. He kept saying it to my brother, and my brother said he did not think so, and my brother kept trying to calm Neil.

Q. Did the defendant appear to be agitated or excited that night?

A. Yes, he always would get extremely excited and pace up and down the room and seem to work himself into such a frenzy over things.

Q. Now, did the defendant leave again, leave Belle Air again around that time?

A. Well, yes, this was when my brother was there the second time. Neil had one remaining lecture to do in some small town upstate, and he had train reservations to go, and then he was to come back and we had plans to go to Palm Springs for Easter, but the day that he left I went to the garage with my brother to go shopping. Neil had already gone and the car was not there, and I called the police, and they told me that if anybody else had a key that I had to determine whether or not that person had the car.

Q. Did you subsequently determine whether the defendant had taken the car?

A. I finally got him later that day at his destination and said, "Neil, do you have the automobile," and he said, [fol. 126] "No, I do not," and I said, "Neil, are you absolutely sure?"

He said, "I don't have it."

And I said, "Neil, I have talked to the police and they tell me that if you don't have the car they are going to put out a stolen car call on it."

I said, "Please, Neil, tell me, otherwise I must notify them."

So then he admitted that he did have the car, and I said, "Why did you, why did you take it?" I said, "I have determined that you had a taxi here this morning and you had train reservations, you told me. Why did you take

the car? You did not tell me. You know I have to have a car in Los Angeles."

"Well," he says, "I decided I wanted to drive it."

I said, "But it leaves me completely stranded, I cannot get around."

The Court: How is this relevant, counselor?

Mr. Winsten: Well, it is an incident. I will terminate it shortly, your Honor.

Q. Did you finally find out where he put the car?

A. Well, quite some weeks later, he then was in New York, and finally through our lawyer it was discovered to be in a garage in San Francisco, and then it was driven down to me.

Q. When you are referring to "our lawyer," you mean the defendant's lawyer?

A. That is Mr. Josephs.

Q. In New York?

A. Yes.

Q. Now, did the defendant remain away more or less until about June of 1952?

A. Yes. You see, he had told me that he was not coming back to me over the telephone several times.

[fol. 127] Q. You had been having telephone conversations with the defendant between this time and June of 1952?

A. That's right.

Q. About how often?

A. Right after he left with the car there were several conversations, and then eventually he would speak to me from New York, and then he wrote me and called me and said he would be back in Los Angeles, he was going to build a trailer.

Q. Well, he finally returned, did he not, in June of 1952?

A. In late May or early June he did return.

Q. And how long did he stay there?

A. He was there then for the month of June and—about the month of June, I guess.

Q. Did you at this time while he was there in June of 1952, have any talk with him about the rings?

A. Yes. The day he arrived I said, "Neil, may I have my rings? I don't like going about without them," and he said, "All right," and he gave them to me.

Q. Now, did you have any talk with the defendant about his trip to Europe that he planned during that summer?

A. Yes, several talks.

Q. Tell us what was said as briefly as you can.

A. Well; he said he was going to go with Ed Parker, he was only going to be in Europe for about three or four weeks at the most, and he was going to rephotograph Germany, and he had to move very fast, and he felt it much better if he went with another man because it was all too difficult, I slowed him down with me and the child, and all of that, and that he preferred to go alone.

The Court: After that conversation did he go to Europe alone?

[fol. 128] The Witness: Yes.

The Court: Is there anything that happened during that time that is important?

The Witness: No, except that he did not want me to go.

The Court: All right. So he went alone on his trip to Europe. Did he come back from there?

Q. Did he write to you when he was traveling in Europe?

A. I got some letters, yes.

Q. Now, did he advise you when he would return from Europe?

A. He said he thought he would come back, he had reservations to come back in September, but that we would stay in Los Angeles.

The Court: Did he come back?

The Witness: No.

The Court: When did you see him the next time?

Mr. Winsten: I will re-put the question, your Honor, because she did not see him.

The Court: Come along, counselor. You are dragging this case along.

Q. Mrs. Vanderbilt, was he due to return on or about September the 2nd, 1952?

A. He was due from Europe on September 2nd, and then he had reservations a couple of days later——

Mr. Rosenblatt: Reservations for what? Is that the conclusion of the statement?

Mr. Winsten: That's the end of the statement.

[fol. 129] Q. Now, Mrs. Vanderbilt, did you hear from the defendant or attempt to contact him in New York?

A. Why, yes. I called him late on the day of the 2nd, on the 2nd of September. I said, "Neil, your boat docked long ago, why haven't you called me?" And he seemed very strange to me, and I said, "Neil, what is the matter?"

And he said, "I don't feel too well."

Q. And I said, "I am all packed, Neil, the lease on this house, you know, is up on the 4th, and today is the 2nd, and I am all packed. What shall I do? You left me without saying definitely what you wanted me to do or where we were to be. What shall I do?"

So then we discussed that, and I said, "Shall I come to New York?"

And he said, "No, no, no," he did not want me to come to New York, and I said, "Well, shall I go to the Beverly Hill Hotel?"

No, he did not think I should do that.

Well, I said, "The only alternative then is that I know of a house available. Shall I take that?"

And after much discussion about the house, he said, "All right, go ahead and sign the lease."

Q. Did you tell him what the terms of the lease were?

A. Yes. I told him that I could not get it for anything less than a year, and he said, "We can always sublease it or change that."

Q. Did you then get this telegram from the defendant?

A. Yes.

Q. About when did you get that, Mrs. Vanderbilt?

A. Dated September 5th, this says.

Q. I am sorry.

A. That is not the one.

Q. I meant to show you this telegram instead. When did you get that telegram?

A. Well, this was following our phone conversation, and I got this then the 3rd.

[fol. 130] Mr. Winsten: I offer that in evidence.

Mr. Rosenblatt: Subject to the same general objection, your Honor.

The Court: Mark it in evidence.

(Received in evidence and marked Plaintiff's Exhibit 5.)

Q. Now, then, when you got that telegram did you make any arrangements for the leasing of a house?

A. Yes.

Q. And did you actually sign a lease for the house?

A. I signed a lease, I believe it was the morning of the 3rd.

Q. And did you have to make any payment in connection with signing that lease?

A. Yes. You see, after I had talked to Neil on the 2nd I asked the real estate woman, and she said, "You have to put up $1,600 on the house. You have to pay the two months rent down," and so then I cashed securities, and when I signed the lease I then gave them my check for $1,600.

Q. Did you receive any money from the defendant at that time to pay for the lease and the securities?

A. No, only—I mean, he said he was going to send it.

Q. Is this the paper you signed that you referred to as a lease for your house?

A. Yes.

Mr. Winsten: I offer that in evidence.

Mr. Rosenblatt: Subject to my general objection, your Honor.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 6.)

[fol. 131] Q. During this time were you talking to the defendant on the long distance telephone?

A. Yes.

Q. And did you on September 5th get this telegram from the defendant?

A. Yes, I did.

Mr. Winsten: I offer that in evidence.

Mr. Rosenblatt: Subject to my general objection.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 7.)

Q. Mrs. Vanderbilt, after receiving the telegram, which is Plaintiff's Exhibit 7 in evidence, did you have any talk

with the defendant on the long distance telephone concerning the subject matter of that telegram?

A. Yes. I called him right away. I said, "Neil, I don't understand this. You knew about the house, you had seen the house, you knew everything about it. Why did you tell me to sign it on the one hand and then send me this telegram as though you don't know what anything is all about? I told you the entire thing over the telephone and even before you went away. We had seen this house as a possibility."

He said, "Well," he said, "I don't think I have to support you at all."

I said, "Are you coming to Los Angeles?"

And he said, "No."

I said, "I have taken the house, it is for all of us."

"I don't intend to," he said, "you must cut way down on money."

I said, "Neil, what do you mean?"

And he said, "The stock market is going to crash and everything is going to change and you must cut down. [fol. 132] I said, "I am willing to do what you say if we can discuss it. You have not told me what has been cut down."

I said, "So far as I know, there is no change at all in the income, you have not mentioned it prior to this time."

I said, "You knew the rent of this house was $800. Now what is your objection now, today, that you did not have two days ago?"

He said, "Well, I just have to do it." He said, "I have been talking to Josephs and you have to do it."

I said, "Who is that is saying that I have to do it? Are you saying I have to do it or is it Mr. Josephs, and we must talk about it if that is the way you feel."

So then he hung up, and during this—then for the next few days we had several conversations.

Q. Tell the Court as briefly as you can the substance of these conversations?

A. Finally in these conversations he said he would not now, he knew he did not have to support me, and he was not going to support me, and he was not going to come to Los Angeles, no matter what I said."

That was the sum and substance of his answers to me in everything, and then he eventually refused to speak to me on the telephone.

Q. Had you made attempts to call him?

A. Yes.

Q. Now, what happened after that, Mrs. Vanderbilt?

A. Finally I made the call where he picked up the telephone, and I got right to him, and I said, "Neil, please, you must tell me what I must do because I am so confused."

He said, "I am not going to speak to you any more. I have put all my affairs in the hands of an attorney and I suggest that you do the same, and don't bother me any more."

[fol. 133] So then I no longer tried to get in touch with him. I went to the hospital for a few days late in September.

Mr. Rosenblatt: May I have the date of that conversation?

The Court: In September, late in September. Is that what you said?

The Witness: There were many conversations.

Mr. Rosenblatt: I want this particular conversation.

The Court: The one before you went to the hospital.

Q. The last conversation, can you fix that time as accurately as you can?

A. I don't know, sir. I was worn out.

Mr. Rosenblatt: Was it before or after the 20th of September or within that period? Can I get any kind of a time in September, please?

The Witness: Sometime around—I should say about the middle because I was in the hospital part of the last week of September.

Q. At any rate it was during the month of September before you went to the hospital that you had this last conversation with him on the telephone, is that correct?

A. That's right.

Q. Now did you then come to New York after that—I withdraw that. What happened to the house that you leased in September of 1952?

A. I remained in it with Nanette.

Q. For how long?

A. Until about mid-February.

Q. 1953?

A. I did not remain there. I was in New York part of the time.

[fol. 134] The Court: What did you do after September? Did you stay in California?

The Witness: I was in the hospital, and then I was in the hospital part of November again.

The Court: All right, in California?

The Witness: Yes, and then I was in New York in December.

The Court: Then you came to New York in December, 1952.

Q. And that is at the time you attended the hearing in the first action, is that correct?

A. Yes.

Q. Your attorneys had instituted an action against the defendant here in this court in October 1952, is that correct?

A. Yes.

Q. And you attended hearings before the Referee Lazar in connection with that action, is that correct?

A. Yes.

Q. And then did you leave New York and return to California for any period of time?

A. Yes, I went to California to finish up with the doctor there. He was making me surgical braces and to close out that house because the people wanted me out, I could not pay the rent, and they had served me with an eviction notice, so then I got out of the house and came to New York.

The Court: During this period did you get any money from your husband? Were you receiving any money from him?

The Witness: I got two checks.

Q. Tell the Court when you got those checks and how much they were?

A. I got one, I believe, for $600 from Neil sometime early in October.

[fol. 135] The Court: Yes?

The Witness: And then I got another one from a lawyer of his sometime in the first week of November.

The Court: How much?

The Witness: I think that was $750.

The Court: You went back to California, and then what did you do, if anything?

The Witness: Sir, I was getting these braces from the doctor and closing out the house to move out, I had been evicted.

The Court: After that happened what did you do?

The Witness: Nanette and I and the dog came to New York.

Q. When did you come to New York, Madame?

A. It was Lincoln's Birthday.

Q. Of 1953?

A. Yes.

Q. And have you continued to reside in New York ever since that time?

A. Yes.

Q. Up to the present day, is that correct?

A. Yes.

Q. Now, where did you go when you came to New York on Lincoln's Birthday in February 1953?

A. I went to 1048 Fifth Avenue.

Q. And whom did you find there?

A. I found the butler who opened the door and let me in and there was another man in there whom I didn't know. He said he was someone representing the estate.

Q. Now tell us what happened while you were there and for how long were you there?

A. Nanette and I and the dog went up in the elevator to the 4th floor and went to Neil's rooms, and I had told the butler before going up that—I had asked him if Neil was there and he said no.

[fol. 136] Q. Just a moment, please. Will you please see if you can testify a little faster and more briefly, please?

The Court: You went to 1048 Fifth Avenue.

The Witness: Yes, sir.

The Court: And you went into the house?

The Witness: I told the butler——

The Court: And you went upstairs?

The Witness: Yes, sir.

The Court: Did you live in the house?

Q. How long did you stay there?

A. I stayed there over night.

Q. And when did you leave?

A. The next day.

Q. Under what circumstances did you leave? What happened to you there?

A. Well, Nanette and I had gone to sleep because we had been flying all day, and then that evening there was a great banging on the door. I woke up, a lot of men's voices outside telling me that I had to get out, and I said, "No, I knew that I did not have to get out at all," and they kept up at me for quite some time, and I said, "Who are you people anyway? And he said, "We are the police, we are going to break down the door," and I said, "That is absolutely impossible, you cannot do such a thing," and then another man said, he said; "I am——"

Mr. Rosenblatt: May it please the Court, I move to strike all this testimony with respect to her visit at 1048 out on the ground that it certainly is not binding in any way, shape, form or manner upon the defendant. He concededly was not there.

The Court: I will strike out anything that anybody said, any conversation.

[fol. 137] Q. Just indicate what was done, what you did and what anybody else did there, Mrs. Vanderbilt?

A. The phone was cut in the midst of the conversations and the lights went out.

Mr. Rosenblatt: May it please the Court, I press my objection upon the ground that this is certainly not binding upon the defendant in any way, shape or manner.

The Witness: You were acting on his orders, I presume, Mr. Rosenblatt.

Mr. Rosenblatt: Now may it please the Court——

The Court: Strike that out.

Q. You say that the phone was cut in the midst of a conversation that you had on the phone?

A. Yes.

Q. And you say the lights were cut off?

A. Yes.

Q. And what else happened there?

A. Well, then, I decided something must be very important——

Mr. Rosenblatt: I move to strike that out, your Honor.

The Court: Strike it out. What did you do, madam?

The Witness: I looked about the room, sir, and I saw a lot of suitcases and a lot of papers all over the place, and this then, you see, was night, and I had to find a candle, and I lit a candle, and I lit the fireplace and I proceeded to read my husband's papers.

Mr. Rosenblatt: I move to strike that out, if the Court please.

The Court: Strike it out.

Mr. Rosenblatt: On the ground that her husband was not domiciled or residing there and she does not know [fol. 138] whether they were his papers or not.

Q. Did you recognize any of the papers you found there as belonging to your husband?

A. Yes.

Mr. Rosenblatt: I move to strike that out.

The Court: I will allow it.

Q. What happened after you read those papers, madam?

A. Well, much later Nanette and I went to sleep, and then the next day my lawyer was at the door——

Mr. Rosenblatt: If it please the Court I move to strike all this testimony with respect to this so-called visit at 1048 out on the ground there is not one word of reference to it in the complaint in this action.

Mr. Winsten: I don't believe that I have to——

The Court: I will allow it, come along.

Q. Go ahead, Mrs. Vanderbilt.

The Court: You have to move faster.

Q What happened the next morning, please?

A. Well, then, Mr. Weinberger, my lawyer, said that he wanted to speak to me, and that——

The Court: The next morning you spoke to your lawyer?

The Witness: Yes.

The Court: After that conversation, what, if anything did you do?

[fol. 139] The Witness: Well, you see——

The Court: What did you do, madam?

The Witness: I let them all into the room, and my husband's lawyers removed all of his papers then and they said I could stay if they got all the papers out of the room.

Mr. Rosenblatt: I move to strike that out, certainly as not binding upon the defendant.

Q. Who was it, do you recall who they were?

A. Well, I recognize one since as being identified as Mr. Roden.

Q. Is this the gentleman here sitting at the counsel table?

A. Yes.

Q. Was he there that morning?

A. There was another very tall——

Mr. Winsten: Is it conceded that Mr. Roden, this gentleman, is Mr. Roden, and that he represented——

Mr. Rosenblatt: It is conceded that he is Mr. Charles Roden, yes.

Mr. Winsten: And that he represented Mr. Vanderbilt, that he was Mr. Vanderbilt's lawyer at the time?

Mr. Rosenblatt: No, he is an associate of mine.

The Court: Associated with the office representing Mr. Vanderbilt?

Mr. Rosenblatt: Yes, in relation to certain affairs, not in relation to everything.

Q. What happened then, Mrs. Vanderbilt?

A. Well, they took a lot of papers out and Mr. Weinberger and I talked the situation over, and I had taken a lot [fol. 140] of the papers and kept them on my person.

Q. Then did you leave 1048 Fifth Avenue?

A. Yes.

Q. When—that same day?

A. Yes.

Q. And where did you go from there?

A. I went to the Barbizon Hotel for Women.

Q. And you remained at the Barbizon Hotel for some time?

A. Yes, I was there until sometime, I believe, in April.

Q. Did anything occur in about the month of April, 1933? Did you move from the Barbizon to any other place?

A. Well, yes, I did. I had no more money, so I went to the Algonquin, and stayed there on a credit card.

Q. And how long did you remain at the Algonquin?

A. Until sometime, I think, in June.

Q. And where did you go from there, madam?

A. They asked me to leave and I couldn't—you see, the credit card had run out, and then the bill was building up, so I left and I went to stay with a girl friend.

Q. And who was that friend?

A. Someone that I have known for about fifteen years.

Mr. Rosenblatt: I move to strike that out. What is her name?

The Court: Strike it out.

Q. What is her name, madam?

A. Mrs. O'Donnell.

Q. Now, I want to direct your attention to a specific thing, now. During the period, 1950 to 1952, did the defendant ever make any reference in his talks with you concerning narcotics?

A. Yes. Early in 1952 he took exception to this doctor, [fol. 141] and he told me—he was not my doctor, he was the father——

The Court: I don't know what you are talking about. You are talking about something with relation to a doctor. There has been no testimony here about a doctor, counsel. Will you proceed with this case and try to lead your witness and ask her proper questions?

Q. What, if anything, did Mr. Vanderbilt say to you concerning the subject of narcotic drugs?

Mr. Rosenblatt: Can we have the time and place fixed?

Mr. Winsten: Yes.

A. This is in Beverly Hills in 1952, sometime early in the year. He says that he has an F. B. I. report, a Federal report on this doctor, that he had five times violated the Narcotics Laws.

Mr. Rosenblatt: May it please, the Court, who is the doctor?

What is the doctor's name?

Mr. Winsten: If you are interested, we will give you the name.

Q. Did he mention the doctor's name?

A. Yes, he did.

Q. And what is the doctor's name?

A. Dr. Kenicky.

Q. And did he mention anything with respect to you in connection with narcotic drugs?

A. Yes.

Mr. Rosenblatt: I move to strike out the testimony about this doctor, because there is no connection shown with [fol. 142] either of the parties to this action. Whose doctor was he?

Mr. Winsten: This is a conversation or a statement made by the defendant, if your Honor please.

The Court: Will you let her testify, counsel, and will you tell her to testify and answer questions?

Mr. Winsten: I am trying to, sir.

The Court: Will you try a little harder, please?

Q. Mrs. Vanderbilt, what did the defendant say in this conversation in connection with narcotic drugs used by you?

A. He said he got information that this doctor was giving or furnishing me with narcotics, and that he had proceeded then to get this report on this doctor, and he said that he wanted me to tell the doctor that he had it, and I said, "Neil, this man is not my doctor. He is the father of one of my child's schoolmates, and his wife and I are very good friends. I only know him socially. I don't know anything else about him."

I said, "I don't believe anything at all about all these reports. It is impossible for you to have such things."

Q. Did you use narcotic drugs at any time?

A. No.

Q. Did this doctor ever give you any narcotic drugs?

A. No.

Q. Did you ever use any narcotic drugs in your life?

A. Only when I have been in the hospital, sir, under major surgery, when they gave me morphine.

Q. Mrs. Vanderbilt, some time subsequent to that was any further reference made by the defendant with respect to narcotic drugs?

A. Yes, he made it again in September in several of [fol. 143] these conversations.

Q. Tell us what he said specifically, in substance, please.

A. He said that he believed that I was using narcotics, and I kept denying it. I got awfully tired of denying it.

Q. Did he sometime in the year—in the summer of 1953 did you overhear any conversation between the defendant and Esther Gilbert on the subject of narcotic drugs?

A. Yes, sir. In August of 1953 I listened in on a conversation that they were having.

Q. Who was having, please?

A. My husband and Esther Gilbert.

Q. Where were you at the time?

A. In her house in Pelham Manor, New York.

Q. Is Esther Gilbert an old friend of the defendant's and yours?

A. Yes.

Q. What did you overhear the defendant say to Esther Gilbert?

A. He said——

Mr. Rosenblatt: May I make an objection also upon the ground that this is beyond the period when the marital relations between these parties were severed, as of June 30, 1953?

The Court: Well, this conversation was when?

Mr. Rosenblatt: This is supposed to be in August of 1953, August, 1953.

The Court: Oh, I see. I will take it.

Q. Now, Mrs. Vanderbilt, what did you hear him say to Esther Gilbert?

A. He said that he had a Federal Bureau of Investigation report on me. He said I had a very shady past, and he said he knew that I had been that summer taking a cure in Doctors' Hospital, and Mrs. Gilbert said, "Neil, I saw [fol. 144] Pat in Doctors' Hospital and she was in traction and——"

Q. Were you in Doctors' Hospital in July of 1953?

A. I was in Doctors' Hospital for about six weeks in that summer of 1953.

Q. And what kind of treatment did you receive at Doctors' Hospital?

A. I was in traction and I was taking physical therapy.

Q. How long were you in traction there?

A. The whole time.

The Court: Traction for what?

Q. Was that in connection with your back or neck injury?

A. Yes.

The Court: Say so, let her say so.

Q. Now I show you this paper and ask you if you recognize the defendant's handwriting on that?

A. Yes, I do.

Mr. Winsten: I offer that paper in evidence. The lady asked for a recess, your Honor.

The Court: Sure; go ahead.

(Whereupon a brief recess was taken.)

Mr. Winsten: I offer in evidence that portion of this letter which contains the handwriting of the defendant, if your Honor please.

Mr. Rosenblatt: May it please the Court, I object on the grounds, as previously stated and on the further ground specifically that this handwriting is obviously at a time after the alleged separation for cause by the plaintiff, and after the decree was rendered in the State of Nevada on June 30, 1953.

[fol. 145] The Court: What is the purpose of this letter?

Mr. Winsten: The written portion of it on the lower right hand corner, if your Honor please, is in the handwriting of the defendant and is corroboration of the witness' testimony.

The Court: I see, all right.

Mr. Winsten: In lieu of offering the letter, I would like to read that portion of it into the record, if your Honor please. This portion being read now is in the handwriting of the defendant in a letter addressed to Mrs. Esther Gilbert, dated July 29, 1953 and signed Cornelius Vanderbilt, Jr., Neil:

"P. S. You asked about Pat. She is in Doctors' Hospital in N. Y. Evidently 'playing possum' unless, of course, it is for a 'cure' for narcotics. I wish she would come to her senses and accept a reasonable settlement and not be shooting for the moon."

The Court: Are you going to finish with this witness this morning?

Mr. Winsten: I believe so.

Q. The portion I just read is in the defendant's handwriting; is it not?

A. Yes.

The Court: You better mark that for identification too.

(Received and marked as Plaintiff's Exhibit 8 for identification.)

Q. Mrs. Vanderbilt, after you were at Mrs. Gilbert's, [fol. 146] where did you go from there?

A. I went to the Barbizon Hotel for Women.

Q. How long did you remain there?

A. Until——

The Court: What do you mean "Mrs. Gilbert," you mean Mrs. O'Donnell?

Q. You mentioned the name O'Donnell?

A. I stayed with Mrs. O'Donnell. Then I went to the New York Hospital—I mean, the Doctors' Hospital—here in New York. Then I went to the Welfare Department.

Q. When did you go to the Welfare Department?

A. The day I left the hospital.

Q. What month in 1953 was that?

A. August.

Q. What happened at the Department of Welfare?

Mr. Rosenblatt: May it please the Court, I object.

The Court: Objection sustained.

Q. After you went to the Department of Welfare, what did you do thereafter?

A. Then I went, that night, out to Mrs. Gilbert's.

Q. Did you have any funds at that time?

A. No, I didn't.

Q. Did you pay your bill at the Doctor's Hospital?

A. No.

Q. Is that bill still unpaid?

A. Yes, I guess so.

Q. After you went to Mrs. Gilbert, how long did you stay there?

A. Until about mid-September.

Q. Where did you go from there?

A. I went to the Barbizon Hotel for Women again.

Q. Did you raise any funds between the time you went to the Department of Welfare and mid-September?

A. Yes, I sold my fur coat and I pawned my wedding and engagement rings.

[fol. 147] Q. Are they still in pawn?

A. Yes.

Q. How much did you receive as a loan on your rings?

A. $450.

Q. And when you left Mrs. Gilbert and went to this Hotel Barbizon for Women, how long did you remain there?

A. Until late November or early December.

Q. Were you able to pay your bill there?

A. I paid as long as I could and then I had to stop paying because I had no money. Then, you see, they locked the door later.

Q. Around this time, was your child taken to the hospital?

A. She was taken——

Mr. Rosenblatt: I move to strike that out.

The Court: Strike it out.

Q. Did you have sufficient funds to feed yourself and your child at this time?

A. No, I didn't.

Q. What did you do in order to raise funds in about November of 1953, in order to feed yourself and your child?

A. I left a watch with a restaurant a block away from the hotel and they said they would keep it until I could pay and give me food to take into the hotel for me and the child. And, they did that for several days, and then on Thanksgiving they were closed and I couldn't feed her, so I went to the Police Station and a Policeman gave me $5 to feed her for that day.

Q. After that, Mrs. Vanderbilt, your child was taken to the Roosevelt Hospital?

Mr. Rosenblatt: I object to that, your Honor.

The Court: Objection sustained.

Q. Where did you go when you found that the Barbizon [fol. 148] Hotel had locked you out?

A. I went out to Esther Gilbert's.

Q. Did the Barbizon Hotel retain all of your belongings and your child's belongings at that time?

A. No, no, way later, the next year they did.

Q. How long did you remain at Esther Gilbert's?

A. Until after Christmas, and then I went to the Commodore Hotel, and then I went to the East End Hotel.

Q. Between November of 1952 and December of 1953, did you receive any money from the defendant?

A. Through the Domestic Relations Court——

Q. The period I indicated was November of 1952 until December of 1953?

A. No, not during that period.

Q. Did you communicate with the defendant at all during that period?

A. Yes, I called him.

Q. When?

A. In November.

Mr. Rosenblatt: What year?

Q. Of 1953, Madam?

A. Yes.

Q. Did you also call him in August of 1953?

A. Yes.

Q. Please tell us what was said by either of you or both of you?

Mr. Rosenblatt: May it please the Court, I object to this testimony, likewise, upon the ground that it is after the period——

The Court: What is the purpose of this?

Mr. Winsten: The purpose is on the question of maintenance and support, if your Honor please.

The Court: I will allow it. Is it conceded for the record he did not give *him* any money? Then, we can eliminate that.

[fol. 149] Mr. Rosenblatt: If it please the Court, there was litigation pending in this very Court until February of this year, 1954 and alimony was denied again, again, again, and again in this very case.

Mr. Winsten: This is 1953, if your Honor please.

The Court: All I want to know, is it a fact that she received no money from this man, whether it was denied by Court order or otherwise, so we don't have to have this testimony?

Mr. Rosenblatt: I don't know.

Q. In August of 1953 did you call the defendant?
A. Yes, from Esther Gilbert's.

Mr. Rosenblatt: May it please the Court, may my statement stand on the record that it is not a question in this case of what she received, but whether she was entitled to receive anything.

The Court: I understand that.

Mr. Rosenblatt: Thank you, sir.

Q. What did you say to the defendant and what did he say to you?

Mr. Rosenblatt: Is this in August, Mr. Winsten?

Mr. Winsten: Yes.

A. I said, "Neil——"

Mr. Rosenblatt: May I have the time in August fixed and the location of the respective parties?

Mr. Winsten: Yes.

[fol. 150] Q. Where were you and where did you reach the defendant?

A. I was at Esther Gilbert's in Pelham Manor and he was in Nevada.

Mr. Rosenblatt: Where, please, where she reached him?

Q. Where did you reach him in Nevada?

A. I don't know. I had gotten the phone number from Mrs. Gilbert, that is all I had, was a phone number; I had no address.

Q. Do you remember the phone number?

A. No, I don't.

Q. Tell us what happened?

Mr. Rosenblatt: Does she remember the city?

The Court: Do you know the city?

The Witness: I can't remember.

The Court: She does not remember. Then, you called him in November.

The Witness: I told him over the telephone in August, "Nanette and I were completely destitute and I was having to go to the Welfare Department, and wouldn't he please come to some agreement with me?"

Q. What did he say, please?

A. He said, what was my price for a divorce and I said I couldn't talk to him on those kind of terms, that wasn't the way I felt. I could talk the situation over, would he please—again I asked him again, "meet me somewhere and we will sit and talk everything over," because I wasn't well and I couldn't do anything for myself.

Q. What did he say to that, Madam?

A. Finally he just said I would have to see his lawyers. [fol. 151] Q. Did you call him again in November of 1953?

A. Yes, I did.

Q. Where did you reach him at that time?

A. I think, also in Nevada.

Q. What did you say and what did he say at that time, give us the substance of it?

A. I told him that the hotel was requesting that we get out because I couldn't pay the bill and I couldn't feed Nanette or myself, and everything was becoming extremely difficult, would he please—the lawyers had been talking and they couldn't seem to arrive at any conclusions, would Neil please talk to me if he could come close by New York, and we could talk the situation over with or without attorneys, whatever he wanted to do, because we were going to be put out in the street.

Q. What did he say, Madam?

A. He said he didn't want to talk to me about it.

Q. Was that the end of the conversation?

A. There was a lot of talk about other subjects, about a friend of his, but that isn't anything here.

Q. You then say you went to the East End Hotel; is that correct?

A. Yes, I went there December 31.

Q. Did you appear in the Family Court or the Domestic Relations Court of the City of New York?

A. Several times through 1953.

Q. Before you went to the Domestic Relations Court, did you receive any money commencing in December 1953, from the defendant or from his representatives through the Family Court?

A. Sometime early in December I got a check, yes, from the Family Court.

Q. When had you applied in the Family Court?

A. In March, of that year, I think.

Q. Of 1953?

A. Yes.

Q. You had applied to the Family Court prior to Decem-[fol. 152] ber 1953; is that correct?

A. Yes, all year.

Q. In December you got a check of how much from the Family Court?

A. $300.

Q. Do you know what the source of that money was?

A. Yes, I was told that it was coming from my husband.

Mr. Winsten: Is there any question that the funds were made available by the defendant or his attorneys through the Family Court, Mr. Rosenblatt?

Mr. Rosenblatt: If you also concede that it was done without prejudice by a letter from the defendant's Nevada attorney to the Corporation Counsel of New York, on that basis.

Mr. Winsten: I will concede that, yes.

The Court: All right.

Q. Did you continue to receive monthly payments of $300 thereafter until April 1954?

A. Yes.

Q. When was the last payment you received in that fashion?

A. I think the last one was in March or April; I am not positive of that.

Q. You received, in all, about four or five such payments; is that correct?

A. That is correct.

Q. When this action was commenced those payments stopped; is that correct?

A. Yes.

Q. You continued to reside at the East End Hotel until when, Mrs. Vanderbilt?

A. Until sometime in November of this year.

Q. What happened in November of 1954?

A. They locked me out.

Q. Did you make an application to the Department of Public Welfare when you were locked out?

A. Yes.

[fol. 153] Q. And what happened after you made that application?

Mr. Rosenblatt: I object to that, your Honor.

Mr. Winsten: I think the Court is entitled to know how the plaintiff is subsisting at this time.

The Court: Go ahead.

A. The Department of Welfare made arrangements with a private agency to take care of me and my daughter.

Q. Where did you spend the night the day you were locked out, you and your daughter?

A. I went——

The Court: Tell us where, where did you go?

The Witness: It is called the City Shelter.

The Court: With your daughter?

The Witness: Yes.

Q. Is that on East 5th Street in Manhattan?

A. Yes.

Q. What happened at the City Shelter?

A. I didn't spend the night there. I went there and they sent me to a hotel close by. They gave me the money and said to go to this hotel.

Q. After you spent the night there, you then went to the Department of Welfare the following day?

A. Yes.

Q. What happened there?

A. Well——

Q. Were you referred to another agency?

Mr. Winsten: Can I lead her at this time?

[fol. 154] The Court: Go ahead, but you are not going to take us through everyday.

Mr. Winsten: No.

Q. Were you referred to another agency by the Department of Public Welfare?

The Court: Tell her what agency, tell her what agency she was referred to.

The Witness: Sir, they don't want it to be known, please.

Mr. Winsten: They don't want their name known. If I can put it on the record so that it should not be made public——

The Court: If there is no objection, you don't have to mention it at all.

Mr. Rosenblatt: I don't object to it.

The Court: You went to some other welfare agency.

Mr. Rosenblatt: When I say I don't object to it, I don't object to the fact that this information be kept off the record, but I do object to the entire line of questioning on the grounds previously stated.

Q. You were referred to a welfare agency in Brooklyn, is that correct?

A. Yes, the City people took me there.

Q. Then you have been receiving money from that agency?

A. Yes.

Q. Is that how you have been subsisting since November 1954 until now?

A. Yes.

Q. Have you received any money from the defendant since March or April 1954?

A. No.

Q. Tell me, Mrs. Vanderbilt, during the period that these incidents occurred from 1950 until 1952, what effect did these incidents have on your health?

[fol. 155] Mr. Rosenblatt: I object to that on the grounds previously stated, it has been inquired into.

Mr. Winsten: Not entirely, if your Honor please.

The Court: Go ahead.

A. It weakened me completely over a period of time.

Q. Tell us what happened to you?

A. Yes. I lost muscle control, and on two occasions, prior to my being put in the hospital, twice, I lost the use of my right arm from this nerve in the spine. Then, I lost a great deal of weight after the boat in 1951. I was awake every single night, night after night. I would be awakened in a cold sweat. My back muscles have become so weakened I have to wear a surgical corset on my low spine and I have to wear this brace off and on and have treatments and rest. It just has changed me completely.

Q. How much do you weigh now, Mrs. Vanderbilt?

A. 90 pounds.

By the Court:

Q. Did you ever suffer from these conditions before this incident that happened on the boat?

A. No.

The Court: All right, next question.

The Witness: I was nervous in 1950, but I didn't have all of these things.

By Mr. Winsten:

Q. Now, Mrs. Vanderbilt, is there any truth to the accusations made by the defendant, as you testified, as to your fidelity with various men?

A. No, sir.

[fol. 156] Q. And as to your use of narcotics, drugs, and any of those other charges made by him against you?

A. No.

Q. Did the defendant indicate, in his telephone conversation with you in September 1952 that he was through with you, definitely and completely?

A. Yes.

Q. Did he indicate an intention to return to you, or his refusal to return to you?

A. He said he would not return, and he did not want me in New York.

Q. Did you offer to go to New York?

A. Yes, several times.

Q. Mrs. Vanderbilt, during the period of your marriage with the defendant, to your knowledge, did the defendant have any bank accounts in various cities in the United States and in foreign countries?

A. Yes, he had bank accounts in Cheyenne, Wyoming, I think, Omaha, Nebraska, Chicago, Illinois, England, and Switzerland.

The Court: What was his business?

The Witness: He was lecturing, sir.

The Court: On what?

The Witness: On travel.

Q. He was a professional lecturer, Mrs. Vanderbilt?

A. Yes.

Q. And his subject was traveling, is that correct?

A. Yes.

Q. Besides an income from his work as a lecturer, did he have any other source of income, to your knowledge?

A. Yes.

Q. Tell the Court what source of income there is?

A. He had estate money here in New York from the wills of his father and his grandfather, and he also got other [fol. 157] bonds in boxes that he told me, where he got money.

Q. Did you know where he had safe deposit boxes at that time during the period of your marriage?

A. Well, you see, the one he had in New York when we were married, he transferred into my name, and then another one, he took in New York later. He sent me the paper and I signed it, and that was in my name, but I have never been there. Then we had another one together in Chicago.

Q. Now, Mrs. Vanderbilt, did the defendant ever accuse you of extracting or stealing any of his property from any safe deposit boxes or elsewhere?

A. He put in a paper, an affidavit before this court, that I had taken money from him.

Q. Did you ever take any money from him?

A. No.

Q. Did he ever tell you, in any one of your telephone conversations that you had, or accuse you, of having taken any money from him?

A. Yes, in January, 1953, I called him in Florida, and asked him to pay the bills at the Barbizon so that Nanette and I could have our clothes.

Q. I direct your attention to the fact that, as to whether that was January 1953 or 1954?

A. 1954, that's right.

Q. What took place in that telephone conversation?

A. Well, I told him that I had been to court that day and about the Barbizon bill, and that the Judge had suggested that the Barbizon lawyer had best pursue Mr. Vanderbilt, so I said, "Neil"——

The Court: What did he say about taking the money?

[fol. 158] Q. Is this what you told Mr. Vanderbilt?

A. Yes.

Q. What did he say? What did you ask him for, if anything?

A. I asked him to please pay the bill, otherwise that they were going to attach, and I would have to give them the information as to what money there was in New York, and he said, well, he would think about that, and he left the telephone and came back, and he was very mean all of a sudden. He said, "I don't understand what you have done with all the money that you have stolen from me. You took all my bonds. You have stolen thirty, forty, fifty thousand dollars from me, and what you done with it all?" Eventually he hung up.

Q. Was it true you had taken any money or stolen any money from him, or bonds?

A. No.

Q. Mrs. Vanderbilt, will you tell this Court the manner and the style in which you were living when you were living with the defendant?

A. Why, yes. We travelled all over in the United States and Western Europe. We stayed at the very best hotels, my daughter and the nurse, along, and we ate at the very best restaurants and he bought me clothes.

Q. What sort of clothes did he buy you, where were they purchased?

A. Always the very best. We got clothes from the big name clothiers in France, and also in England.

Q. Will you name them, please?

A. Jean Desses is Paris, Christian Dior, and Norman Hartnell in London, and various other shops.

Q. Can you give the Court an idea as to how much he spent on those occasions on the clothes?

A. Well, he has told me, and he told my brother, that over a couple of years he himself had spent over $30,000 in clothing for me. That didn't include what I, myself, spent.

[fol. 159] Q. How much did the defendant customarily give you to run your household when you were leasing houses in California?

A. Well, I got checks from his mother for about $1,300 every month and Neil paid the rent and then I would get——

The Court: How much was the rent?

The Witness: The first house was $800 a month in California, and in Chicago it would run us well over that. At the Ambassador East Hotel it would be about $1,500 a month. While we would be traveling in Europe, it would run well over $50 a day for four people.

Q. When you were living in leased houses in California, you testified you had two or more servants; is that correct?

A. Yes.

Q. Was that during the entire period of your leases in California?

A. In the other house I kept only one woman, and then I had other people come in during the week. That was the smaller house.

Q. How much did the defendant give you to operate your household and to pay your household expenses?

A. You see, I used part of the $1,300 a month for the household, and then he would take care of other expenses, or else he would, from time to time, give me a check for maybe $1,000, $2,000, $3,000, for other things.

Q. Are you able to form an estimate, Mrs. Vanderbilt, as to how much the over-all living expenses were for yourself and your husband and your family unit, during the period of 1948 to 1952, including your clothing and other things, and entertainment?

A. You mean the total figure.

Q. Yes, per year, I would say.

A. Well, the figure that I have arrived at is that it is [fol. 160] well over $100,000 a year, because, you see, while I would be maintaining a house, he was also incurring large expenses himself.

Q. Did the defendant publish any books recently?

A. Yes.

Q. Is this the book that the defendant recently published (handing to witness)?

A. Yes.

Mr. Winsten: May I have the book deemed marked in evidence?

Mr. Rosenblatt: For what purpose? May it please the Court, I object to it, marking the whole book in evidence; for what reason?

(Book marked Plaintiff's Exhibit 9 for identification.)

Q. Do you know what earnings the defendant derived from the publication of this book?

A. No, I don't.

Q. Does the defendant publish a monthly news letter called "Vagabonding with Vanderbilt"?

A. Yes, sir.

Q. How long have you been publishing that news letter?

A. Since June of 1952.

Q. Does he still publish that news letter?

A. To my knowledge, he does. The last one I saw was a month or so ago.

Q. Do you know whether the defendant has written any newspaper articles or magazines articles in the last few years?

A. Yes, he has. He wrote several about his mother for women's magazines, I don't remember which, and then he had some things in newspapers, I believe, while we were in Europe.

[fol. 161] The Court. Do you know what he was paid for his lectures?

The Witness: I am not sure, sir, the payments were very varied, depending as to whether it was a small private club or a large hall.

The Court: What was the average?

The Witness: They would run anywhere from $300 a talk to $1,000 or $1,500.

The Court: How many lectures a year did he give that you know of?

The Witness: I don't know, excepting that he lectured during the fall and also in the spring.

The Court: Approximately, do you know?

The Witness: I do not know.

Q. Did his mother, Grace Graham Vanderbilt, die in January, 1953?

A. Yes.

Q. To your knowledge, was he named as executor and legatee under that will?

A. Yes.

Q. To your knowledge, was he entitled to any distribution of property and assets under that will?

A. Yes.

Q. Do you know the extent of such distribution he was entitled to?

A. He was to get $50,000 in cash, some $100,000 worth of jewelry, and then about $40,000 worth of other items, but you see, of course, he and his sister share half-and-half, so he gets half of whatever there is in the estate. There was an old house full of antiques and valuable paintings, and things here in New York, and another house in Newport, Rhode Island, and all of its contents.

Mr. Winsten: I want to offer this will in evidence.

[fol. 162] Mr. Rosenblatt: I object to the offer on the ground it is immaterial, irrelevant, and incompetent in this proceeding.

The Court: Objection overruled.

(The document referred to was received in evidence as Plaintiff's Exhibit 10.)

Mr. Rosenblatt: Nor is it the best evidence of the value, or the value of anything referred to therein.

Mr. Winsten: It is being offered solely for the purpose of showing the nature and extent of his interest.

Q. Mrs. Vanderbilt, did it come to your attention that the defendant received employment with Ed Parker from a firm called Intercontinental Associates?

Mr. Rosenblatt: May it please the Court, unless this witness has absolute, positive, direct personal knowledge, I object.

The Court: All right, suppose you ask the question.

Mr. Rosenblatt: We have enough rumor and hearsay in this case already.

Q. Do you know Charles Ventura?

A. Yes.

Q. Is he a friend of the defendant?

Mr. Rosenblatt: May it please the Court, what has that got to do with this case here?

Mr. Winsten: I am laying a foundation for some testimony here.

Mr. Rosenblatt: Bring the contract into court if you claim he is supposed to get something from some place. Let us not do it with hearsay. I move to strike that out.

[fol. 163] The Court: I will take it. She is just identifying the man. Go ahead.

Q. How long has the defendant known Charles Ventura?
A. For many years. I don't know how many, long before I knew Neil.
Q. Are they close friends?
A. Very close.

Mr. Rosenblatt: May it please the Court, this is a characterization and she cannot testify about that.
The Court: To your knowledge, are they very friendly?
The Witness: Yes.
The Court: Have you seen them together?
The Witness: Yes.
The Court: Have you been in their company?
The Witness: Yes.

Q. Mrs. Vanderbilt, did there appear, on May 7, 1954, in the column of Charles Ventura, called "Society Today," in the "World-Telegram & Sun" any statement with reference to defendant's employment at a stipend of $100,000 a year?
A. Yes.

Mr. Rosenblatt: May it please the Court, I object and move that the answer be stricken, whether anything appeared in any newspaper about anything, has nothing to do with this case, and certainly is not the best evidence of anything.
The Court: That ground is well taken, but not the other. Objection sustained.

Q. Do you know whether the defendant had any con-
[fol. 164] nection with a firm called Intercontinental Associates?
A. Yes.
Q. For how long has he had such a connection?
A. I don't know, sir, when it was formed, but he is part of that company. The book is published under Intercontinental Associates.

Mr. Winsten: That is all. At the beginning of the trial, since the question of jurisdiction has been raised, I made a statement on the record in lieu of deeming certain file papers marked in evidence, and I should like to have those papers deemed marked in evidence in lieu of the statement with respect thereto, and I am referring to the order of publication and proof of service. So, at this time I would like to have deemed marked in evidence the order of the Honorable William C. Hecht, Jr., dated April 21, 1954, referring to publication, since there are two orders on that day by the same Judge, which is a file paper, and the filed papers filed June 7, 1954, consisting of an affidavit of Arthur J. Cavanaugh, dated April 27, 1954, an affidavit of Jack Aaron, dated June 1, 1954, and an affidavit of my own dated April 22, 1954, and the summons and complaint, together with a notice dated April 21, 1954, and a copy of the order of William C. Hecht, Jr., dated April 21, 1954. The affidavit of Arthur J. Cavanaugh is sworn to on June 1, 1954, rather than April 27, 1954.

Mr. Rosenblatt: I object, your Honor, on two grounds: first, that nothing contained in any affidavit is binding upon this defendant. Secondly, upon the ground that nowhere in [fol. 165] those papers was it disclosed to Mr. Justice Hecht, for the action of this Court, that there had already been rendered on June 30, 1953, a decree of divorce in favor of the defendant against the plaintiff, in the State of Nevada.

The Court: Objection overruled.

(The documents referred to were deemed marked in evidence as Plaintiff's Exhibit 11.)

The Court: I take it that the purpose of making the request of the Court in having those papers deemed marked in evidence is to show compliance with the court order?

Mr. Winsten: That is right.

The Court: In connection with service by publication; is that correct?

Mr. Winsten: That is correct.

The Court: For that purpose I am taking it.

Mr. Rosenblatt: May the record note that under the affi-

davit of Monroe J. Winsten, sworn to the 22nd day of April, 1954, service of the summons and complaint, order of publication, and notice required by Rule 52 upon the defendant, was made by enclosing a set of true copies of the same directed to the defendant, Cornelius Vanderbilt, Jr., at 319 First National Bank Building, in the City of Reno, State of Nevada.

May it please the Court, in view of the uninterrupted examination of the plaintiff, I would like not to have to commence and then defer. I would like to ask the Court for its noon recess to take place at this time, so that we may continue thereafter.

[fol. 166] The Court: All right, we will now recess until 2:00 P. M.

(Recess until 2:00 P. M.)

Afternoon Session

2:00 o'clock P. M.

Mr. Winsten: At this time I should like to offer in evidence a portion of the newsletter published by the defendant called "Vagabonding With Vanderbilt" dated May 15, 1953 with respect to the incident that occurred on the ship, the S. S. America, in August of 1951, and also this one here.

Mr. Rosenblatt: May it please your Honor, it appears from an inspection of this paper writing that the part desired in evidence is a quotation from some third party involved.

Mr. Winsten: But, published by the defendant in his News Letter. That is the issue, your Honor.

Mr. Rosenblatt: It is the sheerest hearsay of anything.

The Court: What paragraph is it?

Mr. Winsten: The one with the pencil mark around it. You might as well look at this one too, your Honor. I'm going to offer this one next.

The Court: Of what value is this? How is this revelant?

Mr. Winsten: It is relevant in this respect your Honor; it furnishes corroboration of the plaintiff's testimony with

respect to the accusation made by the defendant with respect to her having an affair on board ship with a cer- [fol. 167] tain man, and furthermore, your Honor, this defendant has made public property of his accusations by disseminating it in these two news letters.

Mr. Rosenblatt: I don't think it is anything of the kind. It is rank heresay.

Mr. Winsten: It is rank heresay, I agree with counsel here that it is rank heresay; but this defendant used rank heresay to besmirch his wife's character in a news letter, and that is the purpose it is offered for, your Honor.

Mr. Rosenblatt: It doesn't change the nature of the hearsay, your Honor.

The Court: Except that he adopted it by printing it.

Mr. Rosenblatt: I don't think that is a fair statement either, your Honor, in connection with the objection.

The Court: Assuming this was a libelous situation.

Mr. Rosenblatt: We are not trying a libel case, your Honor.

The Court: I say assuming it was libel. Even if somebody else said it, if you print it you are responsible in damages. It is the same theory—the fact that you adopted it and printed it, and especially in this case where the parties are so closely related as husband and wife, and he prints something like this which is certainly not complimentary——

Mr. Rosenblatt: This statement is not made by him, your Honor.

The Court: I know it is not.

Mr. Rosenblatt: Nor does it purport to be made by him. [fol. 168] The Court: I appreciate that; but the fact is he printed it in his own publication. He printed something about his wife. I will take it for whatever it is worth.

Mr. Rosenblatt: Then, if that is going to be taken, this issue of May 15, 1953——

Mr. Winsten: And August 15.

Mr. Rosenblatt: Wait a minute, I have not seen that other one at all. This May 15th, 1953, I ask your Honor in taking it to take the entire document.

The Court: I will take it.

Mr. Rosenblatt: And I have my exception. Now let me see the other one please?

(Paper marked Plaintiff's Exhibit 12.)

Mr. Winsten: Your Honor, I only offered one portion of it. If your Honor please, I don't want to be in a position of offering an entire document. I am offering one paragraph of it, and if counsel wants to offer the entire document——

The Court: You are offering that part, and I will receive it and mark it in evidence; and if counsel wants to offer the rest of it, I will take it.

Mr. Winsten: That is the defendant's counsel's offer as to the balance.

Mr. Rosenblatt: I did not offer the balance. I said it was only fair to offer the entire document.

Mr. Winsten: I am only offering one portion.

The Court: The rest of it is immaterial and irrelevant. If you are offering it to show it is a publication of whatever it is, I don't know what purpose it will serve, but the rest [fol. 169] of the article in there—I don't know, I have not read it, I assume it has nothing to do with these two people.

Mr. Rosenblatt: Then will your Honor have the record note that this was addressed from Box 654, Reno, Nevada, May 15, 1953?

The Court: For that purpose I will take it.

Mr. Rosenblatt: And I except to your Honor's ruling. Now may it please your Honor——

Mr. Winsten: Are you pressing the entire document?

The Court: No. He wants me to note that there is a forwarding address on that letter.

Mr. Winsten: Then let the record show the only portion received in evidence under Exhibit number 12 other than the address noted by counsel is the following statement:

"J. Casey"——

Mr. Rosenblatt: Now wait a minute. Does that have to be read?

The Court: It does not have to be read.

Mr. Rosenblatt: It has just been marked in evidence, that is sufficient.

Mr. Winsten: The statement appearing on page 4 of Exhibit 12, the paragraph commencing with the words:

"J. Casey Oldman" and ending with the words: "other husband."

The Court: All right.

Mr. Rosenblatt: Now, may it please your Honor, I certainly object to these three lines, this three line statement, and may I ask your Honor to please read it to your- [fol. 170] self in making your ruling.

The Court: I have read it.

Mr. Rosenblatt: You have read the three lines?

The Court: Yes.

Mr. Rosenblatt: Oh, I see.

The Court: On the same basis that he saw fit to print this about his wife.

Mr. Rosenblatt: I ask your Honor to have the record note, if you won't take the entire paper when part of it is offered, that this second one is also dated August 15, 1953 and addressed, Box 654, Reno, Nevada; and the reason that I wanted these two papers is to show its place in the context of all of the so-called written matter. I take my exception. I have my exception, I take it.

The Court: Yes. Is there an address on there too from which it was mailed?

Mr. Rosenblatt: I read it in, your Honor.

The Court: I will note that.

(Received in evidence and marked Plaintiff's Exhibit 13.)

Mr. Winsten: May the record show that this Exhibit 13 is offered only with respect to a paragraph on page 4, the first paragraph on the page commencing with the words, "Joan Dunop", and ending with the words, "U. S. A.".

[fol. 171] PATRICIA VANDERBILT resumed:

Direct examination.

By Mr. Winsten (continued):

Q. I show you this postcard and ask you whether you recognize the handwriting on it?

A. Yes, it is my husband's.

Mr. Winsten: Can I have it please? I offer it in evidence.

Mr. Rosenblatt: I object to it upon the general grounds previously stated, that this is immaterial, irrelevant and incompetent, not within the issues of this action.

The Court: Will you read that? I cannot understood some of it.

Mr. Winsten: May I have it marked first, please?

The Court: Yes.

(Received in evidence and marked Plaintiff's Exhibit 14.)

Mr. Winsten: Plaintiff's Exhibit 14 reads as follows:

"Don't understand your letters and cards and your lawsuits and all the dirty, phony pictures in L. A. Hospitals, your neck band and charges. If you want to marry the guy, why don't you have your lawyer work it out with mine. Neil V."

May the record also indicate that this postcard is postmarked in New York on March 18, 1953.

I now offer in evidence, if counsel will stipulate, an affidavit of A. L. Manierre, an official of the Hanover Bank, under a stipulation that if Mr. Manierre were called as a witness he would testify to the information contained [fol. 172] in the affidavit. Will counsel so stipulate?

Mr. Rosenblatt: I have my objections on the general grounds and I will so stipulate providing that if there is any objection after we have gone over this paper which was just handed to me, we may have an opportunity to adduce any further information relating to the same.

The Court: With that understanding it will be marked in evidence.

(Received in evidence and marked Plaintiff's Exhibit 15.)

Mr. Winsten: Let the record show that counsel for the defendant has been furnished with a carbon copy of the exhibit.

Mr. Rosenblatt: I just so stated.

Mr. Winsten: That's all.

Cross-examination.

By Mr. Rosenblatt:

Q. Mrs. Vanderbilt, when and where were you born?

A. I am not sure, I don't know.

Q. Will you please name the other members of your family as of September 7, 1948?

Mr. Winsten: That is objected to as irrelevant, incompetent and immaterial, what relevancy any members of the plaintiff's family has to the issues in this case.

The Court: How is that relevant, Mr. Rosenblatt?

Mr. Rosenblatt: There has been testimony here with respect to participation in certain matters by a brother, your Honor will recall. I want to know, and I want this question [fol. 173] answered in order to proceed as to participation of other members of her family.

The Court: All right, go ahead. Go ahead, madam.

The Witness: Well, what am I supposed to say?

Q. Can you tell the names of other members of your family in September 1948?

A. I have a brother Dave and a brother Pat.

Q. What was your maiden name?

A. Murphy.

Q. Now will you state what your brother's name David is?

A. Bronaugh.

Mr. Winsten: That is objected to, if your Honor please—I withdraw the objection.

The Court: Go ahead.. What is your brother's name?

The Witness. When I first knew him, sir, his name was Murphy, and later it was Bronaugh.

Q. Could you spell it, please?
A. B-r-o-n-a-u-g-h.
Q. And in September, 1948, where was he living?
A. In Alaska.
Q. And what is the full name of your other brother?

Mr. Winsten: That is objected to, if *if* your Honor please. There is no testimony in this record that any other member of her family participated in these transactions.
The Court: I will allow it, go ahead.
The Witness: What was the question?
The Court: Your other brother's name.
The Witness: Patrick Bronaugh.

[fol. 174] Q. And where was he living in September, 1948?

Mr. Winsten: That is objected to on the same ground, if your Honor please, and I would like to have a conference at the bar.
The Court: All right.

(Conference between the Court and counsel at the bench.)

Mr. Rosenblatt: Would your Honor ask the witness to step down?
The Court: Yes; step down.

(Further conference between the Court and counsel at the bench.)

The Court: As to the brother Patrick, I will sustain the objection at this time unless you show some connection between him and any of these acts during their married life.
Mr. Rosenblatt: I object.

Q. Would you state where, on or about the 7th day of September, 1948, the other members of your family were?
A. I don't know. My child was with me.
Q. Do you know where your mother was?
A. If I what?
Q. Your mother. You may answer yes or no.
A. I have never had a mother, no.
Q. Or your father?
A. No.

Q. Now, how long before September 7, 1948, had you lived in the State of California?

Mr. Winsten: That is objected to as incompetent, irrelevant and immaterial.

The Court: I will allow it.

The Witness: Am I supposed to answer that?

[fol. 175] The Court: Yes.

The Witness: Since about 1938 or 1939, around in there.

Q. You were not in California in 1937?

Mr. Winsten: That is objected to as remote, if your Honor please.

The Court: If she said she was there in 1938, she can tell us whether she was there in 1937.

The Witness: I was there in my late teens, and it is hard for me to remember exactly when.

Q. Were you ever committed by order of any court——

Mr. Winsten: Objected to.

Q. (Continuing) in the State of——.

Mr. Winsten: I don't want this question completed, if your Honor please.

Mr. Rosenblatt: Now, wait a minute——

Mr. Winsten: May I approach the bench?

Mr. Rosenblatt: I refuse to approach the bench.

The Court: Let him ask his question. He has a right to ask questions.

Q. Were you ever committed to any institution in the State of California for delinquent girls?

Mr. Winsten: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Rosenblatt: I except.

[fol. 176] Q. Did you ever serve any period of time in custody of the California authorities by order of Superior Court Judge Robert H. Scott as a delinquent girl?

Mr. Winsten: That is objected to, if your Honor please.

The Court: Objection sustained.

Mr. Winsten: And I say to your Honor at this point——

The Court: The objection is sustained. He has a right to ask questions.

Mr. Winsten: He is testifying through the means of asking questions.

The Court: He is not testifying. He is asking questions. I don't know what questions he is going to ask.

Q. You testified today that you were familiar with the Island of Hawaii. Do you recall that?

A. Yes.

Q. Had you lived in Hawaii before you came to California?

A. Yes.

Q. Do you know for how long a period?

A. Since I was practically a baby.

Q. And at what age did you come from Hawaii to California, if you recall, approximately?

A. About when I was in my late teens.

Q. Well, would that be sixteen, fifteen, seventeen, nineteen—what?

A. About seventeen or eighteen, possibly.

Q. And when were you first married?

Mr. Winsten: That is objected to, if your Honor please.

The Court: There is no relevancy to that.

[fol. 177] Mr. Rosenblatt: I have a right to establish the time that she was married before, to the father of the child that she has been referring to here.

The Court: Is there any question about the marriage?

Mr. Rosenblatt: I want to establish the date.

Mr. Winsten: There is no question about the validity of the present marriage. In fact, if Mr. Rosenblatt's position is true——

The Court: All right, tell me when you were married.

The Witness: In 1940.

Q. And was that to Earl Wallace, the father of your child, Nanette?

A. Yes.

Q. And when were you divorced from Mr. Wallace?

Mr. Winsten: That is objected to on the ground it is absolutely irrelevant and incompetent.

The Court: I will allow it. When were you divorced?
The Witness: About 1946.

Q. And when did you first meet the defendant, Cornelius Vanderbilt, Jr.?

Mr. Winsten: That is objected to on the same grounds, incompetent, irrelevant and immaterial.
The Court: I will allow it.
Mr. Winsten: Exception.

A. In early 1947, about April.
[fol. 178] Q. And thereafter did you take employment with him?
A. Yes.
Q. In what capacity?
A. I was doing some research work for him.
Q. Did you also do secretarial work?
A. No.
Q. Do you know what he was doing at that time?
A. I knew that he was writing a column for the "New York Post."
Q. As the Travel Editor of the "Post," was it?
A. I don't know his title.
Q. Do you know anything, or did you learn after you came into his employment of any of activities with respect to lecturing, taking motion picture films to illustrate the lectures?
A. Much later. He was not lecturing then, and he told me he had not lectured in a great number of years.
Q. He told you that when?
A. When discussions about lectures occurred, which was quite some time after I had met him.
Q. And did you and he discuss your previous matrimonial situation after you met and became acquainted?
A. Yes.
Q. Did you know how many times he had been married prior to September 7, 1948?
A. Yes.
Q. How many times?
A. Four.
Q. And he knew that you had been married once; is that right?

A. Yes.

Q. And did you make inquiry about your respective families in the course of your discussions before you got married? Did he talk to you about your family and did you talk to him about his?

Mr. Winsten: That is objected to as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

[fol. 179] Q. What salary did you receive in Mr. Vanderbilt's employment?

A. It was about $300 a month.

Q. And did you know where Mr. Vanderbilt had lived for any number of years prior to September 7th, 1948?

A. He told me that he had lived in New York and Washington and Nevada.

Q. Did he tell you how long he had lived in the State of Nevada?

A. I don't believe we went that deeply into the subject prior to our marriage.

Q. Did it come up thereafter?

A. Some where, yes.

Q. And was that a subject of discussion between you and him?

A. Yes.

Q. Now, when was that?

A. There were several discussions about it. You see, he pays his taxes through Nevada, and it was discussed with lawyers and between the two of us.

Mr. Winsten: May I indicate, if your Honor please, at this point that counsel is exceeding the scope of cross-examination by making inquiry into matters that were not brought out on direct examination, and that is with respect to the question of residence and domicile; and may I indicate that if counsel exceeds the cross-examinaion, he is bound by the witness' answers.

Mr. Rosenblatt: Since when by an adverse party?

The Court: All right, come along.

Mr. Rosenblatt: Since when—in what law school?

Mr. Winsten: We have a Court here to rule on those matters, Mr. Rosenblatt.

The Court: Let us not indulge in personalities, gentlemen. You have other problems to worry about.

[fol. 180] Q. When the problem came up of a tax return in the winter of 1947 or early 1948, do you recall any discussion with Mr. Vanderbilt about that?

A. I don't recall the discussion except that I know he told me that Sam Platt could prepare my income tax return and I believe he did it, I am not sure.

Q. And did Mr. Vanderbilt at that time in the course of that very discussion tell you that he had been a long standing resident of Nevada?

A. He had said that, yes.

Q. Did he say it then?

A. I told you I could not recall the discussion.

Mr. Rosenblatt: Now may I read, your Honor, page 220 of the record taken before Honorable Harold S. Lazar, Referee, on the 12th day of December 1952, page 220, over to 221. This is the testimony of the plaintiff:

"Q. Can you tell me when the conversation took place?

"A. I don't know when it took place. I would say inasmuch as Mr. Platt had prepared a tax form for me, I would say it probably would have come up somewhere in the winter of 1947 or early 1948.

"Q. Tell us what the discussion was?

"A. That he had been a long standing resident of Nevada."

Q. Now you knew before Mr. Vanderbilt and you were married that he enjoyed travelling by trailer, did you not?

A. I knew he travelled by trailer.

Q. And did you know in the course of your employment he travelled and stayed at various places in the southwestern part of the United States and in Mexico with his trailer?

A. That is not clear to me.

Mr. Rosenblatt: Will you read it back, please?

[fol. 181] (The last question repeated by the court stenographer.)

The Witness: I don't understand. When is he supposed to have stayed there?

Q. While you were working for him and before you were married do you know whether he was in various places with his trailer?

A. I knew he had a trailer, yes, he had it in and out of California. He was not travelling in it, however.

Q. He did not move it from place to place?

A. He went to Palm Springs with it. Most of the time it was just in a camp. He had a house.

Q. Didn't you go over to Phoenix, Arizona, to see him once on business for him when he was living there in a trailer? Don't you recall that? I think you took your daughter with you.

A. As far as I know he never lived in a trailer. I never saw him living in a trailer. The trailer was always just parked in a trailer camp.

Mr. Rosenblatt: I am now reading from the testimony given by the plaintiff on page 222 of that record:

"Q. Did you visit a trailer camp where you had a trailer after you met him?

"A. At some time or another I did visit a trailer, yes. I don't remember when it was.

"Q. 1947 or 1948?

"A. It would be in there, yes.

"Q. Did he tell you why he had the trailer?

"A. Well, he said he liked trailering. He said that over the years part of his publicity and part of his trademark was the fact that he was a trailerite, and that he wrote from the trailer. I cannot remember anything more about it except that this is something he liked to do, and also the fact of this and also some things I would not like to say.

[fol. 182] "Q. Did you gather from what he said to you that he travelled rather extensively by trailer throughout the United States?

"A. I had gathered that probably at that time I think, I thought he used trailers now and then, but primarily for the point of lecturing his trailer being publicity for the lecture, publicity for the writings, and so forth.

"Q. Do you recall in January 1948 meeting him in a trailer camp in Phoenix, Arizona?

"A. I would not know the exact time but I did at some

time meet him in I think Phoenix. I don't know whether it was at a trailer camp, but I did meet him in Phoenix sometime or other during that period.

"Q. When you were in Phoenix did you see his trailer?

"A. Yes.

"Q. Can you tell me whether you met him at the Araby Trailer Camp in California in the early part of 1948?

"A. I did not meet him there. I went there with him."

Q. Now, when did you last see Mr. Vanderbilt before he left for Europe in the summer of 1948, the year you were married?

A. I cannot recall exactly except that it was before—I think he left in the late spring, he left California late spring.

Q. Do you know why he went to Europe? Did he tell you?

A. Yes: He went to Europe to take pictures for lectures.

Q. Did he have a discussion with you as to the course that those lectures would take in being given in various parts of the United States?

A. No.

Q. Did he tell you when he expected to lecture in the Eastern Part, when in the Middle Western Part, and when in the Far Western Part?

A. I cannot recall whether he ever went into it so deeply with me. I did not know what any of it was about.

[fol. 183] Q. Did you at any time discuss that with Mr. Vanderbilt during your married life?

A. Oh, yes, many times.

Q. And did he tell you that Mr. Vanderbilt took no bookings on the West Coast except in the spring for his lectures?

A. The only thing I know is that from time to time when he would discuss it he would lecture in the East at certain times and in the Middle West at other times, on the West Coast at other times. These times were divided.

Q. Wasn't there a kind of regular pattern each year in the giving of those lectures? That's what I want you to tell his Honor about.

A. No, because sometimes he lectured in California when he was supposed to be in the Eastern States——

Q. Now, then——

A. And vice versa.

Q. And vice versa you said?

A. Yes.

Q. Now I will read from your testimony, Mrs. Vanderbilt, page 318 of the same record before the Referee:

"Q. Well, in those discussions between yourself and Mr. Vanderbilt did you know from such discussions that he took no bookings on the West Coast except in the spring for lectures?

"A. I would say that he had mentioned that, yes.

"Q. And did you in the course of your discussions with Mr. Vanderbilt learn that he accepted bookings for the Eastern part of the United States during the fall of the year?

"A. Yes.

"Q. And that he took bookings for the Mid-west, the Mid-western part of the United States, and some parts of Canada during the winter?

"A. Yes." Now, if the record does not already do so, let us show that that testimony was given on September 12, 1952.

[fol. 184] Now, in preparing for the lectures he visited various places both in the United States and in Europe, didn't he, taking motion films and gathering data?

A. We both did.

Q. And your visits to various places in the United States after you married him were for the purpose of either attending a lecture to be given by him or gathering such material, isn't that so?

A. Oh, not all the time, Mr. Rosenblatt.

Q. Well, when you went to Florida after you married him didn't you go down to get some travel shots and motion picture films down there?

A. We did do some film work down there, yes. That was not the sole purpose or the entire reason for the trip.

Q. Well, nobody objects to combining business with pleasure, Mrs. Vanderbilt. I did not mean to exclude any other reason; but part of the reason for various travels was to gather material f[illegible] the lecture business, wasn't it?

A. That's right.

Q. And for his writings, isn't that so?

A. He was not writing then.

Q. Did he have to write down these lectures?

A. Well, data concerning the travels, yes.

Q. Didn't you tell his Honor this morning that he also wrote for newspapers and magazines?

A. That is broken down into time. It would have to be when we were in Europe. He would write articles and at other times he would write magazine things. He was not doing anything consistently with the exception of the lectures is what I am trying to say.

Q. Do you know if he had any other occupation other than that lecture business?

A. I say, from time to time he wrote different articles. [fol. 185] Q. Excluding that, is there any other occupation that he had?

A. No. He made television appearances and that sort of thing, but there was not anything consistent except the lectures.

Q. And did he tell you that before you even had met him that he had served in the United States Army during World War II?

A. Yes, I know he served in two World Wars.

Q. In both World Wars?

A. Yes.

The Court: Speak a little louder, Mrs. Vanderbilt.

Q. And during the time of your married life in addition to his giving lectures and perhaps writing, you also earned additional moneys by your own efforts, did you not?

A. Why, yes, by working for him. He always told me that everything belonged to the two of us. I helped him.

Q. I didn't ask you that.

Mr. Rosenblatt: Your Honor, I moved that it be stricken out.

The Court: Strike it out.

Q. I want to know whether you did any work on your own, not for Mr. Vanderbilt, and not in association with Mr. Vanderbilt?

A. I did several endorsements.

Q. And were you paid well for those endorsements?

A. I was paid well, yes.

Q. How much?

A. $3,000 for some, and I think $2,500 for one, and I think I did three or four.

Q. And were they done for the J. Walter Thompson Company of New York, and Pond's Cold Cream?

A. Yes.

Q. Do you remember the last one you did?

A. I think I did one in 1951, the last one.

[fol. 186] Q. Are you sure it was not in 1952?

A. No. I did not do it in 1952.

Q. And when in 1951, did you do it?

A. Late in the year.

Q. Would you say it was December of 1951?

A. I don't know, Mr. Rosenblatt.

Q. Well, would you say it was November, 1951?

A. I don't know. It was late in the year.

Q. And how did you appear in that endorsement? Describe your dress and appearance to His Honor.

A. You mean what I wore?

Q. Yes, ma'am. Yes, indeed.

A. Oh, sir, I can't do that. They took many, many pictures, and they changed my clothes all the time. I don't know what appeared.

Q. Did you take any pictures in that period late in 1951 for the Pond's Company, for which you were paid, in an evening dress?

A. I say they changed—they put many different things——

Q. No, just yes or no, please.

A. I think there were evening dresses, yes.

Q. Don't you know there were? Didn't you see them as they were reproduced later?

A. I have seen them, some of the ads, yes.

Q. And didn't you see any of yourself in an evening dress?

A. I have done it several times—it is hard to remember which one——

Q. I am talking about the one you did late in 1951.

A. I know.

Q. What is that?

A. I know you are, but I am trying to remember what I wore, and what was shown. I mean, I had these different pictures—they took pictures almost every year, you see,

and it is hard for me to know what I was wearing. They were not my clothes.

[fol. 187] Q. Well, do you remember that it was a low-cut evening dress that they took your photograph in late in 1951, which was later used in advertisements?

A. There were two or three different poses, that I later saw that did appear that were in different dresses. I now remember I posed in a white one that was all full of beads, white jersey, afternoon dress, and then there was another blue one with huge sleeves, and that was an evening type dress.

Q. Were they evening dresses?

A. That is an evening type dress.

Q. And did it show your neck and decolletege?

A. Yes.

Q. And were you wearing any halter at that time?

A. No.

Q. Now, you told his Honor that you went to Europe in 1949, do you remember?

A. Yes.

Q. Oh, by the way, Mrs. Vanderbilt, I completely forgot to ask you. Could you tell me about your schooling?

Mr. Winsten: That is objected to, if your Honor please.

Q. I want to know, particularly, whether you ever attended a dramatic school?

Mr. Winsten: That is objected to.

Q. Received dramatic arts instruction?

Mr. Winsten: That is objected to on the ground it is incompetent, irrelevant and immaterial.

The Court: I will allow it; just that question.

[fol. 188] Did you?

The Witness: Yes, sir.

The Court: All right.

Q. Did you study under the famous Madam Ospenkaya?

A. I was with her for about two or three months.

Q. And when you went to Europe in 1949, had you already appeared in any of the motion picture films which Mr. Vanderbilt had previously taken for use with his lectures?

A. I think he may have had me in some of the pictures he took in Florida.

Q. That was before you went to Europe in 1949?

A. Isn't that what you are asking me?

Q. That is right. That is right. That is what I asked. Your answer is all right. Now, I want to know whether when you went to Europe in 1949, did you participate by acting in any of the motion pictures that he took during your trip in Europe?

A. I appeared in the films. There was no acting. These are just 16 millimeter color films of me walking along, or the child walking along. There is no dialogue.

Q. I understand that. And that was by prearrangement with Mr. Vanderbilt, was it not? He wanted a shot of such and such a place with you and the youngster walking through, is that right?

A. Well, sometimes he would say he would want us to pick flowers, or do something, but otherwise he would just point the camera.

Q. And when you returned from Europe, do you recall about what date it was?

A. What year?

Q. 1949?

A. No.

Q. You don't recall?

A. No.

Q. You don't recall whether it was on or about the 13th of August, 1949?

A. No.

[fol. 189] Q. You do not?

A. No.

Q. Well, do you recall testifying here in this courtroom that when you returned, you had to see a doctor? I think you said you were suffering from fatigue or something in 1949?

A. Yes, that's right.

Q. And may I ask whether or not you went to any hospital?

A. Yes, I went to the Doctors Hospital.

Q. And was that on or about the 15th of August, 1949?

A. I don't know.

Q. Were you there for two days?

A. Yes, two or three days.

Q. Were you attended by Dr. Charles Yongue?

A. There were several doctors. I think he was one of them.

Q. Well, what pains were you complaining of at that time?

A. Well I had—I don't know—I wasn't particularly complaining of pains, that I recall. I had been awakened—I had awakened in the middle of the night, and I felt as though I couldn't move.

Q. Did you tell anybody you thought you had polio?

A. No.

Q. Did you tell anybody where the lack of motion was in your body?

A. Yes, I just felt, generally, that I couldn't move my back or my legs.

Q. Didn't you complain of pains in your neck and spine?

A. Well, then, later, I did, yes.

Q. And when you went to the Doctors Hospital in August of 1949, do you recall that they took X-rays of your neck and spine?

A. Yes.

Q. Now, can you tell me, as you told your counsel this morning about the X-rays in Paris, what those X-rays showed?

A. They didn't show anything.

Q. You are sure about that?

A. Yes.

[fol. 190] Q. And you are sure that they showed no disc trouble in your spine?

A. I am sure of it, yes.

Q. Now, after you returned from the hospital, you were attended by a Doctor Foster Kennedy. Do you remember him?

A. That's not after I returned. He saw me in the hospital.

Q. Oh, he saw you in the hospital as well?

A. He had only seen me once, Mr. Rosenblatt, and that is in the hospital for approximately ten minutes.

Q. I see. Dr. Yongue took more care of you, did he?

A. Well, he is the one who had come to the house on that night, and then he had seen me in the hospital, and I guess I saw him after that a few times.

Q. And you also saw Dr. Robert Wallace, didn't you, who cut his vacation short to come and see you in the hospital? Do you remember him?

Mr. Winsten: I did not get that name.

Mr. Rosenblatt: Dr. Robert Wallace.

A. I have seen Dr. Wallace, yes; I think I did see him then.

Q. Didn't you discuss with Dr. Wallace these pains you complained of in your neck and spine at that time?

A. Well, I can't recall seeing Dr. Wallace in the hospital.

Q. Did you see him afterwards?

A. I think I did. I think I did, but, you see, everything had subsided then.

Q. But you told him what you had complained about, didn't you?

A. I don't recall whether I told him, or whether he had discussed it with the other doctors. I don't know whether I told him.

[fol. 191] Q. Would you say that you did not tell Dr. Robert Wallace that your complaint was about pains in your neck and spine?

A. Would I say that I hadn't told him?

Q. That's right.

A. I would say I don't recall telling him.

Q. You might have told him? Is that a fair statement?

A. It is possible.

Q. Now, when did you return from Doctors Hospital in 1949?

A. I was only there two or three days, and then I went back to 1048.

Q. And then you went back to 1048. Now, do you want his Honor to have the opinion that 1048 Fifth Avenue was an apartment which you and your husband occupied?

A. I haven't said anything about it. I don't know what you mean.

Q. Well, tell his Honor the facilities that were occupied by you, your daughter and Mr. Vanderbilt at 1048 Fifth Avenue.

A. At what time?

Q. At any time.

A. Well, to begin with, we had, Neil and I had occupied the quarters on the fourth floor.

Q. Now, that was a sitting room, bedroom and bath.

A. And there is——

Q. Just answer yes or no, please.

A. Well, there is a little more than that.

Q. What else.

A. There is an extra sort of a little room that you go into before you get into the sitting room and the bedroom, and then there is another large closet area.

Q. And did that have any kitchen?

A. No.

Q. Did it have any sinks, or stoves, or facilities that are customarily found in an apartment?

A. No, no kitchen.

Q. And when your daughter stayed at 1048, you and she occupied quarters on the third floor, did you not?

A. Yes.

[fol. 192] Q. And there were no housekeeping facilities in those quarters, were there?

A. No.

Q. This place, 1048 Fifth Avenue, was occupied by Mrs. Cornelius Vanderbilt, Sr., wasn't it?

A. Yes.

Q. And did you know that she did not own it?

Mr. Winsten: That is objected to.

Q. At any time that you lived there, did you know that?

Mr. Winsten: Whether Mrs. Vanderbilt, Sr., owned it or not, I do not believe is material.

The Court: I will allow her answer. She said it was the home of Mrs. Vanderbilt.

Mr. Winsten: I do not think there is any dispute that it was her home during her lifetime.

Mr. Rosenblatt: Is there any dispute that she did not own it?

Mr. Winsten: I do not know, but you and I know that she lived there during her lifetime.

The Court: As far as she knows, that was the home of the Vanderbilts, is that right?

The Witness: Yes.

The Court: All right.

Q. You mean, so far as you know, it was the home of Mr. Vanderbilt's mother, am I right, Mrs. Vanderbilt?

A. As far as I know, it was my husband's home, too.

Q. And you have made that assertion many times before, haven't you?

Mr. Winsten: That is objected to, if your Honor please.

The Court: I will allow it.

[fol. 193] Q. I said, you have made that statement many times before?

A. What statement, sir?

Q. That 1048 Fifth Avenue was your husband's home?

A. Yes.

Q. Now, when you went to 1048 Fifth Avenue, did you pay rent?

A. No.

Q. Who paid the rent, if you know?

A. I don't know.

Q. Did you pay for any servants there, household servants?

A. Yes.

Q. Which one?

A. My child's nurse.

Q. That was paid for by Mr. Vanderbilt?

A. I paid her.

Q. Where did you get the money, or did you have your own funds?

A. I had funds available to me from my husband.

Q. And when you got to California, did you arrive there about the 3rd of October, 1949, your child's birthday?

A. Yes.

Q. And where did you live?

A. We went to the Sunset Tower.

Q. Is that an apartment hotel?

A. Yes, sir.

Q. And at that apartment hotel, would you say that you lived there until when?

A. Until I leased the Beverly Hills house.

Q. And that was when?

A. Around the 1st of January.

Q. 1950?

A. Yes, sir.

Q. Now, during this time in the Fall of 1949, where was your daughter in school?

A. She was in school in California.

Q. Was it any distance from the Sunset Towers apartment hotel?

A. Well, quite some distance, yes.

Q. And did it require your assistance in taking her to and from the school?

A. Well, I only took her a few times. Then the bus, the school bus called for her.

[fol. 194] Q. And did you drive a car at that time?

A. I got a car, yes, somewhere in there.

Q. What is that?

A. Sometime in there, I did get a car.

Q. Didn't you have a Cadillac, you testified to his Honor about?

A. You see, the Cadillac had been—the other Cadillac had been turned in, and then I later received a new one out there, and I can't recall when I received it.

Q. You know you applied for registration in California on it, didn't you, at some time?

A. I don't think I had California then.

Q. You were still with Nevada plates?

A. I am not sure. The car, I do know, had California plates on it the last time I saw it.

Q. Well, in 1949, didn't you still have Nevada plates on it?

A. That's the car, yes, that my husband had given me before we were married.

Q. That is right.

A. But that car was in New York.

Q. Didn't you apply for registration again in the State of Nevada?

A. I don't recall.

Q. But, at any rate, you did drive the car when the necessity arose in California in the Fall of 1949, or the beginning of 1950? Is that a fair statement?

A. Yes, I had driven in California, yes, certainly.

Q. Now, did you have any physical disabilities in that period of time.

A. I was under medical care.

Q. Practically all the time, isn't that so, Mrs. Vanderbilt?

A. I was trying to get stronger so I could——

Q. You were trying to get stronger, and you had different doctors in Los Angeles attending you, didn't you?

A. That is right.

[fol. 195] Q. And could you give us their names?

A. Well, there is only Dr. Collianni.

Q. And his specialty was what?

A. He was a general man.

Q. That is right, and he gave you medical inspections every once in awhile, general checkups, didn't he?

A. He was giving me vitamins and shots.

Q. That is right, and didn't he also give you things to kind of calm your nerves?

A. No.

Q. No nerve medicine at all?

A. No.

Q. You had no sleeping pills, of course?

A. I never take them.

Q. And you had no use for any barbiturates of any kind?

A. No.

Q. Now, just refresh your memory just a little bit.

Mr. Rosenblatt: I offer in evidence, may it please the Court, an exemplified copy, photostatic copy, from the State of California, office of the Secretary of State of Sacramento, California, attesting that on October 19, 1949, Patricia W. Vanderbilt, described as Patricia Wallace Vanderbilt, Post Office Box 654, Reno, Nevada, applied for and secured from the State of California, an operator's license for this motor vehicle.

Mr. Winsten: That is objected to as immaterial. I do not know for what purpose this is being offered at this time—material to what issue?

The Court: I will allow it.

Mr. Winsten: Exception.

(Exemplified copy from Office of Secretary of State of California was received in evidence and marked Defendant's Exhibit B.)

[fol. 196] Mr. Rosenblatt: I offer in evidence, may it please the Court, exemplified record from the State of California, Department of Motor Vehicles, which is an application for duplicate registration card, by Patricia W. Vanderbilt, the registered owner of the Cadillac 8 Model, year 1949, and the application for a California registration of a non-resident vehicle, which is the same car, Cadillac, 1949, with a statement that it was last registered in the State of Nevada in the year 1950, both carrying the signature of Mrs. Patricia W. Vanderbilt.

The Witness: How do you know it is my signature, Mr. Rosenblatt?

Mr. Rosenblatt: It is a filed record. You can look at the copy yourself.

Mr. Winsten: Is this your signature (handing document to witness and indicating)?

The Witness: (Witness examines document.)

Mr. Winsten: Is it? Is that your handwriting?

The Court: Suppose we take a five-minute recess as soon as she answers this question.

Is it or is it not, madam?

The Witness: It just looks strange, sir, I don't know whether it is or not.

The Court: Well, we will take the recess.

(A short recess was taken.)

Mr. Winsten: Now, does your signature appear on this paper?

Mr. Rosenblatt: I do not understand, your Honor, how counsel can interrogate concerning and exemplified copy of [fol. 197] a document which is forwarded here from the State of California, and I have offered the paper. Whether it was her signature, or a forged one, or whatever it may be, it is a true copy of the record on file in the State of California in the Motor Vehicle Bureau.

The Court: Let her answer it. The question has been put to her.

The Witness: There are two signatures, sir.

The Court: Is there a signature there in your handwriting, or some writing of yours?

The Witness: There are two different things, and on this one (indicating), I would say it is definitely my handwriting, and on this one (indicating), it doesn't look like it hardly at all.

Mr. Winsten: I object to it on the ground it is incompetent, irrevelant and immaterial.

The Court: All right. Mark it in evidence.

(Exemplified copy of record from State of California, Motor Vehicle Bureau, was received in evidence and marked Defendant's Exhibit C.)

Q. By the way, Mrs. Vanderbilt, before your marriage to Mr. Vanderbilt, and when you were working for him, I believe you said, for the sum of $300 a month, did you support yourself and your child on those monies?

Mr. Winsten: That is objected to as incompetent, irrelevant and immaterial.

[fol. 198] The Court: How is that relevant, Mr. Rosenblatt? At that time she had the obligation to support her child, or somebody else may have had.

Mr. Rosenblatt: I do not know, your Honor.

The Court: Well, her action here is based on the obligation of a present husband.

Mr. Rosenblatt: Her obligation is based on the claim against a non-legal husband. Let us put it that way.

The Court: Whatever it is, her claim is based on the fact that she says that Mr. Vanderbilt is supposed to support her here.

Mr. Rosenblatt: Now, may it please your Honor, I want to point out——

The Court: What difference does it make whether she did or did not support her child before that?

Mr. Rosenblatt: Can I point out that this Section 1170-B, which comes into operation, supposedly, although I claim it is unconstitutional, and completely inapplicable, provides that after this case is dismissed, the Court may make an award as justice may require, and I do not know what

the legal definition of justice is. Maybe we will have to establish it for the first time.

The Court: All right.

Mr. Rosenblatt: So I want to know——

The Court: Go ahead.

Q. Would you, please, answer the question?

The Court: Did you support yourself and the child?

[fol. 199] The Witness: Yes.

The Court: All right.

Q. Just for my understanding, you supported yourself and your child on the $300 a month you got from Mr. Vanderbilt, is that right?

A. Yes.

Q. Now, I think you said that in 1950 you leased a house in California, is that right?

A. Yes.

Q. And where was that house?

A. In Beverly Hills.

Q. Can you give the address?

A. 714 North Beverly Drive.

Q. And what was the rental?

A. $800 a month.

Q. And did you live there throughout the year 1950?

A. I was there most of the year, yes. I was back and forth to New York a couple of times.

Q. Would you tell me when you were back and forth to New York in that year.

A. In the Spring and then again in December.

Q. And were those trips to New York for a very extensive period?

A. I wasn't here very long either time, no.

Q. Were they just a few days?

A. In December it was about a week, and in the early part of the year it was, I think, a couple of weeks.

Q. And was your child at school during that year in California?

A. Yes.

Q. And you did not go to Europe during that year of 1950?

A. No.

Q. Now, when did your child commence taking dancing lessons?

A. Very early in the year or, possibly, late in 1949. I don't remember when she started exactly.

Q. But you know the name of the dancing teacher?

A. Yes.

[fol. 200] Q. And what was his name?

A. His name was Nico Charisse.

Mr. Winsten: I cannot hear you.

The Court: Nico Charisse is the name of the dancing teacher. All right. Next question.

Q. And where were the lessons given?

A. Mostly at the—all the time at the studio, and then he gave her one or two at the house.

Q. And when you say studio, what do you mean?

A. His studio. He had a dancing studio.

Q. Was it a separate building, or was it part of his own house?

A. No, it was a whole dancing studio with all kinds of dancing rooms and lots of teachers.

Q. He did not live there?

A. Not that I know of.

Q. Was any room in your house equipped for a dancing studio?

A. Yes, a sun porch; he put up a bar for the child to practice. It wasn't equipped before that.

Q. And did this man come to your house and give the child dancing instruction?

A. He came once or twice after he put the bar into the house.

Q. And did you continue with those dancing lessons for your child for a period of time?

A. Until—I can't recall when, but then Neil told me she had to stop, and then she stopped going.

Q. And she did not have any other dancing instruction thereafter?

A. No.

Q. Has she ever had since?

A. No, except in Pennsylvania, when she visits there.

Q. Mrs. Vanderbilt, did you ever take any dancing lessons?

A. I have taken some, yes.

Q. From Mr. Charisse?

A. No.

[fol. 201] Q. While you were married to Mr. Vanderbilt?

A. No.

Q. You had taken dancing instruction before you ever met him?

A. I had taken in about 1939, 1940.

Q. You went to a dancing school?

A. Yes, I took a few lessons, and that is all.

Q. And you cannot tell me when in 1950 these lessons were discontinued?

A. No.

Q. Did you go away for the summer of 1950 or were you in Los Angeles?

A. I was there most of the time. Now, many times Neil and I have gone to San Francisco, or some place like that, I can't remember whether we did that year or not, just, you know, for a few days.

Q. Do you recall that you and Mr. Vanderbilt registered to vote in the spring of 1950 in the State of California?

A. Yes.

The Court: Registered what?

Mr. Rosenblatt: Registered to vote in the State of California.

The Witness: Yes.

Q. And you were both somewhat active in James Roosevelt's campaign to become governor, weren't you, in that year?

A. Yes in the summer.

Q. And also in the fall, isn't that so?

A. The elections are early in November, so——

Q. Well, up to the time of the election?

A. Yes.

Q. And you acted on motion picture films, did you not, during the summer of 1950?

A. I did not act on any films.

Q. There were no films taken of you in 1950 in which you appeared?

A. Well, Mr. Vanderbilt was constantly taking pictures. He may have taken some. I don't know.

[fol. 202] Q. Don't you know that you appeared in films for the candidacy of Mr. Roosevelt?

Mr. Winsten: If your Honor please, there is a difference between appearing in films and acting. I think that the witness——

The Court: The question describes it.

A. There was a film taken of me, yes.

Q. And did you entertain at your home in California, prior to the campaign, for various persons interested in furthering Mr. Roosevelt's candidacy?

A. I did not particularly entertain these people, Mr. Rosenblatt.

Q. You mean they just came to the house?

A. On occasions they came. Once I served some people some breakfast.

Q. You had different meetings, didn't you, at different times before the election in your house?

A. There were only one or two meetings in the house concerning the campaign.

Q. Did you attend other meetings elsewhere in the State of California?

A. At Mr. Roosevelt's house.

Q. And elsewhere?

A. Well, it depends on what you are talking about.

Q. Well, I do not think I am speaking Greek. I am speaking about meetings in furtherance of the candidacy of Mr. Roosevelt.

A. Well, as for meetings, I think the only meetings were at the ones I have stated in both of these places, at the Beverly Drive place and the Roosevelt house.

Q. Now, did you ever attend any of the local headquarters for candidates in connection with Mr. Roosevelt's own candidacy for governor?

A. No.

[fol. 203] Q. Never?

A. Headquarters is way, miles away downtown.

Q. You never went down to headquarters?

A. No.

Q. Did you ever go to the outlying headquarters districts, the one in Santa Monica, the one in West Los Angeles?

A. No.

Q. None of those?

A. No.

Q. And the one at Beverly Hills?

A. No.

Q. Did you get to know any people who were associated with the campaign of Mr. Roosevelt?

A. Well, I met the people that either came to the Beverly Hills house where we were, or in Mr. Roosevelt's house.

Q. And will you, please, tell me, now, who was the gentleman that you say Mr. Vanderbilt accused you of impropriety with during that campaign?

A. He never told me who it was. He said an official in the Democratic headquarters.

The Court: Shall we suspend here, Mr. Rosenblatt?

Mr. Rosenblatt: If you like, sir.

The Court: All right. We will adjourn until tomorrow morning at nine thirty.

(Whereupon an adjournment was taken to Wednesday, January 12, 1955, at 9:30 o'clock A. M.)

[fol. 204] New York, N. Y., January 12, 1955

9:30 o'clock A. M.

Trial Continued

Appearances:

(Same as heretofore.)

PATRICIA VANDERBILT resumed:

Cross-examination.

By Mr. Rosenblatt (continued):

Q. You remember, Mrs. Vanderbilt, telling the Court yesterday that you did not know when or where you were born, do you remember that?

A. That's right.

Mr. Rosenblatt: I offer in evidence, may it please the Court, exemplified copy of registration of the voters of Los Angeles County, pertaining to the registration—affidavit for registration of voting by the plaintiff, sworn to on the 13th day of September, 1950.

Mr. Winsten: No objection.

(Received in evidence and marked Defendant's Exhibit D.)

Mr. Rosenblatt: May it please the Court, I want you to examine that, at the same time looking at Plaintiff's Exhibit 1 in evidence.

Q. Now, how much older was Mr. Vanderbilt than yourself when you were married?

A. Well, I was 28 and—I am trying to remember how old he was then. He was born in 1898, and he must have been 50 then when we married.

[fol. 205] Q. There were 22 years difference in your ages?

A. I have not figured it.

Q. You knew he was quite a bit older than yourself?

A. Yes.

Q. When you had gone out with him and been in this company before you were married, had he evidenced any signs of jealousy?

A. I don't quite know what you mean.

Q. Well, you went with him for a period that you were in his employment before you married him in September, 1948, didn't you?

A. Yes.

Q. And you also went out with him socially during that period, didn't you?

A. Yes.

Q. Well, did he appear to you to be jealous of the attentions received by you from other men during this time before you were married?

A. There was no one paying attention to me.

Q. Oh, and were men paying attention to you after you were married?

A. No.

Q. No, is that your answer?

A. Yes.

Q. You have never had any other men paying any other attention to you?

A. No.

Q. Is that what you want the Court to understand?

A. That is what I am saying. It depends on what you mean by attention, Mr. Rosenblatt. I want to know what your interpretation of attention is.

Q. I will take whatever you understand it to be.

A. I am not sure that I understand.

Q. Do you know what I mean when I ask you whether Mr. Vanderbilt was a jealous man?

A. I know now most certainly that he is.

Q. Did you know by the time you married him?

A. I don't believe I knew then what I know now.

Q. He only became a jealous man after you were married, is that your testimony?

[fol. 206] Mr. Winsten: That is objected to, if your Honor please. That is not the testimony.

The Court: The objection to the form of the question is sustained.

Q. When for the first time do you say from the day you first met him did he show any signs of jealousy that you could see?

A. In 1950 these wild accusations started.

Q. And not before that?

A. No, nothing like that.

Q. Now, do you remember testifying about the medical treatment you had received in 1949?

A. Yes.

Q. And that you were under the treatment of doctors thereafter from your arrival in California on or about October 3, 1949, through the following winter, 1949-1950, do you remember that?

A. Yes.

Q. And during that period of time was the defendant present on various occasions with you in California? Was he there for Christmas of 1949?

A. Yes.

Q. And was he there afterwards when you leased your house, I believe you said the first part of January, 1950?

A. Well, it is my recollection that he left right after New Year's.

Q. Did he see the house that you leased?

A. Yes.

Q. Before you leased it?

A. Yes.

Q. You showed it to him?

A. Yes, he went through it completely.

Q. And when for the first time do you say that he pushed you?

A. Well, sometime in 1950, around in the spring is when he started with taking me and holding me by the shoulders and pushing and holding me against a chair or the wall.

Q. And during that period of time in 1950 you say that [fol. 207] you were pushed six times, do you remember so testifying?

A. I don't remember saying six times.

Q. Well, at page 48 of the record in answer to an inquiry "On how many occasions did that take place, madam?" made by your counsel, you testified "About six times he pushed me, he would hold me down with his hands in a chair or against a wall," do you remember so testifying?

A. I said about six, from what you are reading.

Q. That's what I want to know. How many times was it?

A. I cannot recall.

Q. Was it more than six?

A. I cannot recall because it has happened through the marriage.

Q. No, we were talking and your counsel was talking about the year 1950.

A. He was doing it then. I am trying to say that I cannot recall how many times.

Q. Is it your testimony now that throughout the marriage he pushed you about six times?

A. No.

Q. Or was it six times in 1950?

A. There were many scenes and then he would do it. It is impossible to remember and count the number of times.

Q. What I want to know is when for the first time did he push you as you described?

A. I am saying I do not recall when was the first time. It was in this period.

Q. But it was not before 1950?

A. I don't recall any of this wild business before that time.

Q. Well, when did you have the arguments about some re-writing of the mother's codicil, do you recall that?

A. 1950.

The Court: Is that the first time you started to disagree or have misunderstandings, as you have described them?

[fol. 208] The Witness: About anything major, yes, sir.

The Court: Leading up to this holding down and pushing up against the wall?

The Witness: Yes.

The Court: Is that the way it started?

The Witness: Yes, sir.

Q. And your brother David was familiar with your complaints against Mr. Vanderbilt on that subject, wasn't he?

A. On what subject?

Q. On this subject of Mr. Vanderbilt making accusations and getting into arguments with you?

A. I had not told my brother about the will business, no.

Q. But did you tell him about the accusations about men?

A. My husband told my brother.

Q. Your brother was with you for quite a period during 1950, wasn't he.

A. He was never with us for any length of time. He would fly in from Alaska in connection with his business, and then he would stay with us. Now, several times that happened when we were in California.

Q. For how long would he stay at a time?

A. For a week, ten days; sometimes two weeks.

Q. And was he p esent on any occasions when you were taxed by Mr. Vanderbilt with attentions from other men?

A. Not when Mr. Vanderbilt physically attacked me, that I remember.

Q. Well, by words.

A. Yes.

Q. He was?

A. Yes.

Q. And what did he say?

A. Who?

Q. Your brother.

A. Well, he always tried, as far as I know, to placate Neil and calm him and would tell him that in reference to the accusations that Neil was making about the dancing teacher, that my brother knew the dancing teacher, [fol. 209] my brother had been in the house when the dancing teacher was there, and he explained to Neil——

Q. Was your brother there when the dancing teacher equipped a room in your house?

A. I believe he was. I believe he helped him.

Q. And you told his Honor that the room was a sun room, is that right, a sun porch?

A. Well, it was a porch that had been completely closed in. It had been re-done.

Q. You had re-done it?

A. No, no. The house was as it was when I leased it.

Q. And it was a vacant room, wasn't it?

A. It was an upstairs—it was not a room. It was an upstairs porch that had been re-done by the people, and completely closed in.

Q. Do you recall testifying in this court as follows, page 50: "Well my brother would then say to Neil, of course he knew it was not true, he had been there with me when Neil was away, and that there was not anything at all going on with the dancing teacher, that the dancing teacher had equipped a room, a vacant room in the house, as a dancing studio for the child in order to rehearse and practice, and that he had been present on many occasions when I was in the dancing school with the child, and how could Neil possibly conclude such things." Do you remember so testifying?

A. Yes.

Q. Was that true?

A. Yes. My brother constantly told Neil that he knew it to not be true.

Q. But your brother, as you say, visited for short periods of time and he was not always there when the dancing teacher arrived, was he?

A. I believe he was during this time. That was the only time the dancing teacher was in the house.

[fol. 210] Q. In 1950?

A. Was when he put this dancing bar up in this room.

Q. And he never was there otherwise?

A. I say he gave the child a couple of lessons there.

Q. Although he himself had a building as a dancing studio with plenty of room for giving instructions?

A. That's right.

Q. Is that right?

A. That's right.

Q. Now, tell me who was this Democrat at the State Headquarters, Democratic Headquarters, that you were charged with misconduct with?

A. Neil never identified who it was to me.

Q. He never mentioned the fellow's name?

A. No.

Q. And you don't know to this day?

A. I do not.

Q. And who was this senator that you referred to?

A. Which senator?

Q. Well, you brought out the fact in a conversation with Mr. Vanderbilt in a question by your counsel:

"Q. And who did he specifically refer to?

"A. The dancing teacher and someone in the Democratic Headquarters, and then he mentioned another man, a senator, whom I did not even know." Well, who was the senator?

A. He had something to do with that medical type of thing, Hadacol, and that's the only thing I know. He is from a southern state.

Q. What's that?

A. He is from a southern state. There was a lot of publicity about it. That's the only thing I know about him.

Q. Was he a state senator or a United States senator?

A. I don't know the man. I know nothing about him except that he is connected with this Hadacol.

Q. And you have not the slightest idea and you never knew the senator?

A. No; I don't know him. I have never known him. I [fol. 211] don't know him to this day.

Q. And you never met him?

A. Never.

Q. Well, did you ask Mr. Vanderbilt why he mentioned this senator? Didn't you think that was strange?

A. I certainly did.

Q. And did you ask him?

A. Whenever he would bring up these things I would attempt to find out what he was talking about and why he was loosely throwing names of men at me, and men that I did not even know, some of them, so in this particular case I did tell him, "I don't even know him."

Q. Do you recall that in the 1950 period, besides the names of those that you referred to, this dancing teacher, someone in the Democratic Headquarters, and the senator whom you did not know, were there any others?

A. During 1950?

Q. Yes.

A. I cannot recall any others during that time.

Q. And did you in——

A. Oh, yes, he did throw another name at me, I think, during this period in making reference to people before we had gotten married. He mentioned a toy manufacturer. I knew him, and his wife, they were friends of mine, and he said I had gone out with him. I had not gone out with him at all.

Q. This was a statement in 1950?

A. Yes.

Q. Something had happened?

A. He said I had gone out with him before I was married, all these silly things, and I had never even gone out with him. I hardly knew him, particularly.

Q. And Mr. Vanderbilt just pulled that right out of the air, did he?

A. Oh, yes.

Q. Didn't you think these were very strange things to say?

A. Oh, my, yes.

Q. If they had no basis?

A. Yes, indeed, I did.

[fol. 212] Q. And what did you do about it?

A. I constantly kept talking to him and trying to point out to him that none of this was true.

Q. That's right; and you did not convince him, did you, because he kept bringing it up again and again?

A. You cannot convince him of anything.

Q. That's right; you cannot convince him of anything. He kept bringing it up again and again, didn't he?

A. That's right.

Q. And what did you do then?

A. Eventually I felt it was fairly hopeless.

Q. That's right; and did you start discussing divorce with him?

A. No, I did not.

Q. Never.

A. No.

Q. Is that a fair statement, that divorce was never discussed?

Mr. Winsten: That is not what she testified to, if your Honor please.

Mr. Rosenblatt: This is cross-examination, your Honor.

The Court: I will let her answer if she can. Answer it.

The Witness: What is it?

Q. The question is: did you ever discuss divorce with Mr. Vanderbilt?

A. Before I was married we had a discussion about divorce.

Q. Before you were married?

A. Yes.

Q. Now, tell me, during the period of your marriage did you ever discuss divorce with him?

A. Well, in December—I did not bring up the subject. In December of 1950, when I was here and after Mr. Joseph had met me, I asked Neil why was he now sending this attorney to discuss divorce with me. Well, of course, that comes to a discussion of divorce. It was not my desire.

[fol. 213] Q. You had not discussed before you saw Mr. Joseph—and is that Colonel N. Henry Joseph of 90 Broad Street?

A. Yes.

Q. That you are talking about?

A. Yes.

Q. Before you saw him, in December of 1950, you testified, you tell the Court, that the subject of divorce was never raised between you and Mr. Vanderbilt; is that right?

A. In what connection?

Q. In any connection, madam?

A. Well, now, in the course of time a person might mention divorce. Does that mean a discussion?

Q. I want to know whether you had any discussion during the year 1950 when he pushed you this six times and when he made false accusations?

A. No, no. We had talked before we were married that we would never get a divorce, that he had had enough and I had too.

Q. And you were going to carry that out, is that right?

A. Very definitely up until right now, this very minute.

Q. Mrs. Vanderbilt, you did not consider that you had any provocation for divorce or any matrimonial action in 1950, did you?

Mr. Winsten: That is objected to as incompetent, irrelevant and immaterial.

The Court: Will you reframe the question?

Q. Did you consider in 1950 that you had any grounds for any matrimonial action against Mr. Vanderbilt?

Mr. Winsten: That is objected to, if your Honor please.

A. I don't know how to answer that because I was constantly trying to work things out with Neil.

[fol. 214] Q. How long had you resided in the State of California up to 1950?

A. Well, I was there from 1938 or '39 until the time I got married to Neil.

Q. And you had been there thereafter too, hadn't you?

A. Well, then we had—late 1949, yes. Then we were there again.

Q. And did you know anything about the laws of California respecting separation or divorce?

A. I don't know anything about the laws, no.

Q. Hadn't you had a divorce from your husband in the State of California, as you testified, in 1946?

A. Well, yes, I had, but I had a lawyer.

Q. And what grounds did you use in the State of California in 1946?

Mr. Winsten: That is objected to, if your Honor please.

The Court: How is that relevant?

Mr. Rosenblatt: I want to show that this lady is not a

stupid woman and that she knew what it was all about in 1950, as well as she did in 1946.

The Court: All about what, Mr. Rosenblatt?

Mr. Rosenblatt: Matrimonial causes of action.

The Court: How would that be relevant here?

Mr. Rosenblatt: Well, your Honor, I want to know if a basis of complaint in this court is actions allegedly taking place in 1950, which is four years before the institution of this particular action. I want to know how relevant they are, whether they are not remote and trivial, whether they are to be seriously considered by any court.

[fol. 215] The Court: Well, that depends upon the testimony as to what happened and what she decided to do.

Mr. Rosenblatt: The question is how did she regard these things at the time they happened.

Mr. Winsten: If your Honor please, a wife has a right, regardless of what a husband thinks, to try to resurrect her marriage.

The Court: All right; I will let her answer.

Mr. Rosenblatt: I would like an answer to the question, your Honor.

The Court: Yes, I said let her answer.

The Witness: May I have it?

The Court: What were the grounds upon which you obtained a divorce in California from your former husband?

The Witness: I think it said cruelty.

Q. Was it cruel and inhuman treatment?

A. I don't remember, Mr. Rosenblatt.

Q. Or cruelty, was it, you said?

A. I don't remember; I think it was based on cruelty.

Q. And in testifying about your stay in Madrid in June of 1951——

A. Where—when?

Q. Madrid, June 1951.

A. Yes.

Q. Now, I am past 1950 for the moment, I will return to that, but I am now in 1951. You recall testifying that sometime in June you were in Madrid with Mr. Vanderbilt?

A. Yes.

Q. And you recall testifying about an incident at a cocktail party at the Embassy?

A. Yes.

Q. Well, had any accusations been made against you by Mr. Vanderbilt from any time in 1950 to June of [fol. 216] 1951?

A. There were a couple of times in early 1951.

Q. Where was that, madam?

A. Over the telephone he made reference to all these things again, early in the year.

Q. Did he make up any new ones?

A. No.

Q. He was constantly engaged in taxing you with infidelity, wasn't he?

A. He would do it from time to time and then he would be completely different in between.

Q. And were there times that he taxed you, early in 1951, with respect to the same people that he had been mentioning in 1950, did he start in all over and over and over again?

A. Yes.

Q. So that the incident following your visit to the Embassy that you talked about, in Madrid, that was a new one?

A. Yes.

Q. Now, who were you supposed to have been doing something wrong with in Madrid?

A. Well, he mentioned all this about the ambassador.

Q. And the only contact that you had had with the ambassador and which he complained of, as I understand, was that you had talked too long with him at this cocktail party, is that right?

A. Yes.

Q. He said he thought you had spent an inordinate amount of time with the ambassador, is that right?

A. Well, to that effect, yes.

Q. And who was this ambassador?

A. The American Ambassador to Madrid. His name was Stanton Griffin or Griffith.

Q. The Honorable Stanton Griffis, is that right?

A. That's right.

Q. And the complaint was that you had talked too long to the Ambassador, is that right?

A. Oh, that night, yes.

Q. And did the defendant say that you should have talked to other people in addition to the ambassador and [fol. 217] circulated around through the cocktail party?

A. No. He just was upset because I had sat on the settee and talked to the ambassador for some time.

Q. Well, do you know anything about etiquette at embassy parties when you travel in Europe?

A. I don't know, no.

Q. What's that?

A. No.

Q. Now, tell me, when the man telephoned from the embassy and suggested an evening, including Flamenco, who was that man?

A. I cannot remember which one it was, but it was either a Mr. Duke or a Mr. Biddle. I believe that there were two there who were assistants or what have you, to the ambassador. Neil had known both of them all his life, and I don't remember—he kept talking about both of them.

Q. You mean the First Secretary there, Mr. Angier Biddle Duke?

A. He might be the one, I don't know.

Q. And he invited you out for an evening?

A. He talked to Neil. He did not talk to me. Neil told me about it.

Q. In other words, Mr. Vanderbilt had the invitation from him and said that he had turned it down, is that right?

A. No, he did not say he had turned it down.

Q. What did he say?

A. He talked to me about it, and I said that I would love to go, and then is when he started all of this:

"Why are you so eager to go," and had I been seeing anybody from the embassy between the party and now, this invitation.

Q. Tell me, did you know about Mr. Vanderbilt's physical condition in the year 1951?

[fol. 218] A. Well, I knew about it, depending on what time you are talking about.

Q. Well, let us talk about June, 1951, in Madrid.

A. Yes.

Q. Had Mr. Vanderbilt had any kind of a coronary condition?

A. Not that I know of.

Q. What physical condition were you aware of?

A. What?

Q. What physical condition were you aware of that Mr. Vanderbilt had?

A. That spring, just before sailing I had seen his medical report from the Army. It was a hearing, it contained a hearing, and various phases of doctors' conclusions at Walter Reed Hospital in Washington.

Q. Do you know when that was dated?

A. I think it was 1943—'42.

Q. 1942 or 1943?

A. Yes.

Q. What was the physical ailment, if any, or ailments of Mr. Vanderbilt as reported in this medical report back in 1942 or 1943?

A. Well, it is a long—it is a hearing and certain people testified in this thing, I take it, from what I could gather from the thing, that he is claiming to have some heart trouble, and the doctors were saying that he did not have heart trouble, that he had various mental disorders, so it gets a little confused in there to me.

Q. Is that all you have to comment with respect to that report that you say you saw?

Mr. Winsten: I have the report here, Mr. Rosenblatt. Do you want to see it?

Mr. Rosenblatt: No, I am not interested in the report. I want only to know what the lady knew.

A. Well, you see I have seen—I had at that time seen other medical reports of him.

[fol. 219] Q. Prior to the spring of 1951?

A. Not this report; I had not seen that before the spring of 1951. I had seen his current physical reports, his general physical reports.

Q. Did he go to doctors quite frequently?

A. Oh, yes.

Q. All I want to know is whether by the spring of 1951—Strike that out, please. Would it be fair to say that you

had kept aware of the physical reports that he had any time even before 1951?

A. Well, he talked all the time about his physical condition, and then I would see these other reports from the doctor in Washington, and then I talked to other doctors who attended him, too.

Q. And you had observed him, too, hadn't you?

A. What do you mean? I was living with him.

Q. That's right; and you talked frequently in your testimony about his nervous exhaustion—do you remember those words?

A. No.

Q. You never said those words?

A. I had exhaustion.

Q. You did not say anything about him?

A. I may have; he was always very nervous and tense.

Q. Didn't you just tell us—do you recall your testimony at pages 79 and 80 of this record, as follows, by your counsel:

"Q. And what did you say to him during this discussion or dispute?

"A. Well, I pointed out to him again that none of it was true, and that I felt in view of the fact that he was always so nervous and so over-wrought and complaining about the lectures and how the lectures were going, that wouldn't it be much better to save our marriage if he took some time and did not lecture for awhile, and then we could then be together more the way we used to be and maybe if I should stay together, close together, maybe he would not be so nervous all of the time, and his doctors had said that it was too much for him and he said [fol. 220] it was too much for him. I told him that I believed that it was his nervousness and the things that were weighing on his mind that made him turn against me this way, and that he knew and that I knew that there was nothing to any of these accusations. Well, then, finally from this period we then arrived at amicable relations again and we went back to Beverly Hills."

Do you recall that testimony?

A. Yes.

Q. Was it truthful?

A. I said it many times.

Q. That's what I am asking, about the exhibition of nervousness given by this defendant at different times and before 1951. Am I right that you witnessed such exhibitions of nervousness?

A. Yes.

Q. Is it correct that he had the attributes of a nervous person?

A. Well, you see during 1950 he was nervous and overwrought I felt due to or about his sister and all of the talk about the codicil to the will.

Q. Did that go on all through 1950?

A. Not all through 1950, no.

Q. Well, how long did it go on in 1950?

A. About the will was early in 1950.

Q. Was that subject finally closed out at any time?

A. No.

Q. This will business.

A. The subject concerning the sister was never closed out.

Q. And the subject about the codicil to the will, was that never closed out?

A. Well, he finally got his sister to agree to the codicil. He went to see her. He told me himself that he told her about the F. B. I. report on her husband.

Q. And that was finally settled?

A. Yes.

Q. That question?

A. Yes.

Q. And you had had nothing to do with the settlement, [fol. 221] had you? You did not go to the sister, did you?

A. No.

Q. And thereafter, the disputes in 1950 were solely with respect to those accusations about men, is that right?

A. Well, I mean—that's pretty correct, yes. He would bring up other things, many other things to which I objected.

The Court: What I want to know, madam, is this: What did he want you to do? You testified in your direct examination that he talked to you about the codicil in the will, and he wanted you to talk to his sister. What did he want you to do in connection with the codicil?

The Witness: Sir, he wanted me to tell his sister that he had an F. B. I. report directly from J. Edgar Hoover to the effect that his sister's husband had been involved in some Federal crime of some sort, and that he wanted me to induce her, to tell her that he was going to have all of this exposed, and that it was his influence that was preventing the sister's husband from going to jail, to the Federal Penitentiary.

The Court: What did he want her to do?

The Witness: He wanted me—it sounded like blackmail to me—that I should tell her that he was going to use this against her husband unless she agreed to this codicil because the mother was not well.

The Court: In other words, your husband wanted you to tell his sister that if she did not agree to the codicil, or what he wanted about the will, he would expose her husband in connection with an F. B. I. report about some trou- [fol. 222] ble that he had had—with the what?

The Witness: With the Federal Government.

The Court: With the Federal Government.

The Witness: The F. B. I.

The Court: The F. B. I.; and is that the time that you had the argument with him and he argued with you?

The Witness: Yes. This went over quite some time. Then he told me that he was going to have his lawyer tell her that, and then eventually he told me that he had done it himself; that he had gone to her and done it himself.

Mr. Rosenblatt: You see, your Honor, the testimony, the import of the testimony at best is that the defendant made a request of the plaintiff to do something and she refused, and then he went and did it himself. That is her present testimony. She did not testify to that previously, that he had done it himself. On that basis I now move, your Honor, to strike the whole reference, anything to do with the codicil out of this case.

Mr. Winsten: Objected to, your Honor.

Mr. Rosenblatt: It has no place in this record whatsoever, sir.

The Court: She said that he wanted her to take this information to the sister and he grabbed her and pushed her

up against the wall when she refused to do so. That's my recollection of her testimony.

Mr. Rosenblatt: I will have to get all the references to that testimony.

[fol. 223] The Court: Suppose you check it.

Mr. Rosenblatt: All right, your Honor.

The Court: And I will reconsider it.

Q. When you came back from your holiday after the election—do you remember you said you were going somewhere after the election in 1950?

A. Yes—well——

Q. You don't recall that? You don't recall that?

A. I do recall that after the election in 1950 I went alone for about four days or so to a hotel in Santa Monica, and later I went——

Q. I just want to fix the time, that's all. Do you recall then you returned to Beverly Hills where you were living?

A. I then came back for about a day or two, and then Thanksgiving comes in there and then I went to Palm Springs with the child and the maid.

Q. That was in California, too, Palm Springs, wasn't it?

A. Yes.

Q. And did you continue to live in California until the following spring of 1951?

A. Yes, we still had the house there.

Q. Wasn't your child in school?

A. Yes.

Q. You came to New York around May, 1951, didn't you?

A. No. The lease was expired before that.

Q. When in 1951 did you come to New York, do you recall?

A. Well, we had two six-months leases on that house which went through 1950, and then we took it on a month to month basis for three months, so that means, January, February and March.

Q. If the lease expired in January it would make it April, wouldn't it?

A. What?

Q. The end of this three months period?

A. No, no. Two six-months leases in 1950 means a year,

[fol. 224] to the end of December. Then we had it on a month to month basis for three months of 1951. That takes it to the end of March.

Q. And then did you come after the end of March to New York, that's all I want to know, madam.

A. Yes.

Q. Was your child at school during the winter of 1950-1951?

A. Yes.

Q. And had your child been in school during the previous year of 1949-1950?

A. Yes.

Q. Was it the same school?

A. How far into 1951 are you taking me?

Q. Only to the end of the spring term, whenever that might be.

A. In 1951?

Q. Yes.

A. It was not the same school then.

Q. It was a different school?

A. Yes. She was in school here in New York the early part of 1951.

Q. When she came from California you placed her in school here in New York?

A. Yes.

Q. So that her schooling was all unimpaired, that's all I am trying to establish, madam. Through both those winters the child got her schooling, whether in California or in New York, she got her schooling?

A. Of course; she always went to school.

Q. And when you returned from Europe in 1951, I am getting to the fall of 1951——

Mr. Winsten: Mr. Rosenblatt, Mr. West, the bank witness, is here. Would you want to suspend with this witness at this time and put him on?

Mr. Rosenblatt: Of course.

Mr. Winsten: Your Honor, there is a witness from the bank here, and Mr. Rosenblatt agrees to put him on the stand.

The Court: All right, step down.

[fol. 225] JOSEPH A. WEST, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

(The witness states he resides at Westfield, New Jersey.)

Direct examination.

By Mr. Winsten:

Q. Mr. West, are you connected with the United States Trust Company of New York?

A. I am, yes.

Q. In what capacity?

A. Trust Administration Department.

Q. Do you have an account for the Vanderbilt Trust in your bank?

A. Yes, we have more than one.

Q. How many trusts are there in which the defendant, Cornelius Vanderbilt, Jr. is a beneficiary or has any interest in?

A. Under the will of Cornelius Vanderbilt, his grandfather, he has a life interest in that trust. Under the will of Grace G. Vanderbilt, his mother, and also through the Estate of Grace G. Vanderbilt, which is the same mother.

Q. There are two trusts in which he has a life interest or is a life beneficiary, and also the estate itself in which he has some interest as a legatee, is that correct?

A. You say as—all right, as is all right.

Q. Now tell us what is the corpus of the two trusts?

A. Under the will of Cornelius Vanderbilt it is now about $360,000. Under the will of Grace G. Vanderbilt it is now about $325,000, subject to change upon the completion of the Estate of Grace G. Vanderbilt.

Q. And when you say "subject to change," you mean it may be subject to increase?

A. I do.

Q. By the transfer of additional funds from the execu-[fol. 226] tors of the estate to the trustee, is that correct?

A. That is correct.

Q. So that the Estate of Grace G. Vanderbilt has not been completely liquidated and distributed, is that correct?

A. The administration is still continuing until we get an accounting.

Q. How long has the trust under Cornelius Vanderbilt been in effect?

A. I don't know, but for many years.

Q. Now give us the annual income that was distributed to Cornelius Vanderbilt, Jr. from that particular trust, say for the past two or three years. Do you have some statement to that effect that you could let us have in lieu of your testimony?

A. No, I have no statement on that.

Q. Well, can you give us that information?

A. Yes. The trust under the will of Cornelius Vanderbilt produces about $12,000 income annually. I have with me a schedule of the property in that trust if you would like it.

Q. No. You gave me the value of the corpus, that's sufficient.

A. Yes, that's correct.

Q. Now, the trust under the will of Grace G. Vanderbilt was created at what time?

A. That was set up last year.

Q. When? Can you give us a month or a date or something closer than a year?

A. Well, I think it was in the spring of 1954 with a partial delivery from the estate.

Q. I see. Well, was the entire corpus delivered to the trustee in the spring of 1953 or 1954—was it '53 or '54?

A. '54.

Q. When was the final amount of the corpus as it exists now turned over to the trustee?

A. The final amount was not turned over. I said we must wait for the culmination of the executors' accounting in order to turn over.

[fol. 227] Q. I understood you to say in the spring of 1954 a portion of it was turned over. Was there any other portion turned over to the trustee during that period?

A. No.

Q. Oh, I misunderstood you. I am sorry. Then what you have now is what you had when the trust started?

A. That's right. In other words, we operate the estate, and when we come to an opportune time, we set up the trust created by the will of a decedent.

Q. Between the time that this trust was set up and the

present time how much did that trust yield which was distributable to the defendant, Cornelius Vanderbilt, Jr.

Mr. Rosenblatt: Does that mean annually?

Mr. Winsten: Well, it has not been in existence a year yet. The witness testified that it was erected in the spring of 1954.

A. That is from memory; I did not check that, but that is from memory. The income from the trust under the will of Grace G. Vanderbilt produces $10,000 a year. I don't have any figure except what we paid over to Mr. McCoy as receiver and sequestrator of the property.

Q. In giving us this figure of the $10,000 a year, did you project the income that it yielded for a shorter period than a year, and then compute it on an annual basis, Mr. West?

A. I did, yes.

Q. What was the amount that you used in making that computation?

A. Well, I took a six months period and it would be the same for any six months, because the interest is paid semi-annually and dividends paid quarterly, so that if you will take a six months period and double it, you will get the annual income.

[fol. 228] Q. No, leaving the two trusts, in the capacity of the United States Trust Company as one of the executors under the will of Grace G. Vanderbilt, does it now hold any property subject to its control or to the control of the receiver which remains undistributed, in which the defendant, Cornelius Vanderbilt, has an interest?

A. Well, yes.

Q. Well, can you tell the Court what the nature of the property that still remains undistributed to the defendant in the estate is?

A. Well, that same thing we have been discussing. The balance of the trust when the estate is closed, he has an interest as life tenant in that money for income for life. He also has some personalty which has not been turned over to him as yet.

Q. And as I understand it, there still remains——

A. Excuse me. The latter part of that is his own personal property.

Q. Did it pass to him through the will or this was his own property?

A. This passes all through the will of Grace G. Vanderbilt.

Q. Then, in other words, what you meant when you said it was his own property is that it was distributable to him directly instead of distributed to the trustee, is that right?

A. That's correct.

Q. Can you tell the Court what the property that is distributable to him in kind consists of and what its value is?

The Court: You are not going to detail every item, are you?

Mr. Winsten: No, no.

Q. Give us just a general description of what it is, what the items consist of, and if you have any appraisals the total amount of the property.

A. Well, the items of personalty, that would be furniture, [fol. 229] paintings, and stuff like that, which is still undistributed, but most of which has been distributed. Now—just a second, I have my answers marked and I have to check. A one-quarter interest—this is his interest as an executor, he is entitled to a one-quarter interest in the estimated commissions as an executor of his mother's estate, which will be about $34,000. In addition——

Q. Is the $34,000 the amount estimated as distributable to him as commissions or one-quarter of that?

A. That is the amount going to him, that is his one-quarter share of the estimated figure.

Q. Now, can you give us the value, the appraised value of the personalty, either distributed to him or distributable to him directly from his mother's will?

A. Yes. Distributed to him, $43,000.

Q. In cash?

A. In property.

Q. I see. Was there any cash distribution made to him?

The Court: That was distributed to him when?

The Witness: During the operation of the estate, sir. I don't know exactly when.

Mr. Rosenblatt: The property, he says. Is that right?
The Witness: That's property, yes.

Q. Grace Graham Vanderbilt died in January of 1953, did she not?
A. That's right, January 7, 1953.
Q. And that $48,000 in property was distributed since that date, right?
A. That's right.
Q. Was there any jewelry distributed to him under the will?
A. There was jewelry distributed to him of a total of 107-odd thousand dollars.
Q. That is the appraised value, is that correct?
A. That's correct.
[fol. 230] Q. Was there any cash distributed to him in his mother's will?
A. There was a $50,000 legacy paid to him.
Q. And when was the jewelry distributed to him, do you know, Mr. West?
A. Yes, I can tell you that. It was in the fall of 1953 when the Yankees were playing one of their final games when we made delivery to him.
Q. Did you make the actual delivery?
A. I did.
Q. Where did you make that delivery?
A. In Jersey City, New Jersey.
Q. Was there any reason why you went to Jersey City?

Mr. Rosenblatt: I object to that.
The Court: Objection sustained. Is there anything else?
Mr. Winsten: Yes, one more item.

Q. Can you give us the value or the estimated value, of the amount of property that remains to be distributed to him, and the value of the amount of property that remains to be transferred to the trust for his benefit, just those two figures, if you can give them to me?
A. Surely. The trust will be about $125,000.
Q. More?
A. More, in addition. That was your question, I think.
Q. That's right.
The Court: In the Grace Vanderbilt estate.

The Witness: In the Grace Vanderbilt estate, yes, sir.

The Court: All right.

The Witness: The personal property is a small amount, around $10,000. In addition to that there is a fund at our [fol. 231] bank of $20,000, set up by both he and his sister to adjust any division, to make it equal at the end, when it is all determined.

Q. You mean that that fund is to adjust any inequality of division of property in kind, is that correct?

A. Yes; that's correct.

Mr. Winsten: That's all.

Cross-examination.

By Mr. Rosenblatt:

Q. These additional amounts that are supposed to come to him are subject to the fees and the expenses of the administration of the estate, aren't they?

A. Legally, yes.

Q. And these amounts of income that you talked about as going to him, they are all subject to trustee's commissions, aren't they?

A. Yes, they are.

Q. And any other expenses of those trusts that may be incurred?

A. That's right, sir.

Q. And he has to pay an income tax, as far as you know, on any income received from those trusts, doesn't he?

A. Absolutely, we all do.

Q. Now, tell me, Mr. West, as representing one of the executors of the Grace Vanderbilt estate, on January 7th, 1953, the date she died, did Mrs. Vanderbilt own 1048 Fifth Avenue?

A. She did not.

Q. Had she sold that house many years previously?

A. She had.

Q. And when she died on January 7th, 1953, was there a provision under which the executors had a right to remove assets and personalty that might belong to her, but that the executors had to completely vacate possession four months after her death?

A. That's correct.

[fol. 232] Q. So that on May 7, 1953, even any personalty which belonged to her estate had to be out of those premises?

A. Correct.

Q. And was it?

A. They were.

Q. What's that?

A. They were removed; nothing was left at the house.

Q. Now, who was in possession of 1048 Fifth Avenue, looking after the personalty that remained there after she died, on or about the 12th day of February, 1953—was it the executors?

A. The executors, absolutely.

Q. And were they paying the expenses that were incurred in connection with the servants and whatever might be required in that place?

A. Yes, we were; absolutely.

Mr. Rosenblatt: That's all.

Redirect examination.

By Mr. Winsten:

Q. I just want to identify certain information that the bank previously furnished me. I believe you are aware of that. There was identified a painting called Fountain of Indolence, appraised at $20,000. What is the status of that painting? Is that in the category of undistributed or distributed property at this time?

A. I don't know the painting you refer to, Mr. Winsten, but some have been delivered, and there is one in question. I don't know what the name of that is. It is a Turner, but I don't know what to call it.

Q. Yes, that's the Turner. It is entitled Fountain of Indolence.

Mr. Winsten: That's all.

[fol. 233] Recross-examination.

By Mr. Rosenblatt:

Q. Do you remember having an offer on that painting of $6,000?

A. I don't remember, no.

Q. Do you have any offer on it?

A. We would not have any offers, sir. The property is not the executor's.

Q. Oh, I see. Thank you.

The Court: All right, step down.

PATRICIA W. VANDERBILT, resumed:

Cross-examination.

By Mr. Rosenblatt (Continued):

Q. When you left Spain were the relations between yourself and your husband agreeable?

A. Yes, we had things smoothed over before we left there.

Q. And do you recall going to Luxembourg—is that right?

A. Yes.

Q. Now, tell his Honor what happened about that automobile accident.

A. What do you mean, what happened?

Q. Well, we have heard a lot about what happened on a boat in 1951. Tell me what happened in the automobile accident—in what month was that, by the way?

A. Now that must be late July.

Q. Of 1951?

A. Yes.

Q. And who were in the car?

A. My husband and I were in the car.

Q. What's that?

A. Just the two of us.

Q. And what hit you?

A. A train.

Q. And the train knocked the car up into the air, didn't it?

A. Well now, I would not know about that.

[fol. 234] Q. Were you blacked out at the moment?

A. No.

Q. Were you conscious?

A. Why yes, but it was away across—this is a very sudden, severe blow, and we were—when the car finally stopped it was across the circle, a European circle, at an intersection.

Q. You were hit by a train which was going, weren't you?

A. Yes.

Q. And weren't you knocked out of the car?

A. No, no, no.

Q. Oh, you were not?

A. Of course not. I was not knocked out of the car.

Q. You stayed in the car all the time?

A. What do you mean?

Q. Well, you did not get thrown out of the car, you must have stayed right in the car during the time of the accident?

A. This is a very quick thing. The car is thrown, it stops, finally I open the door and I got out.

Q. And nothing happened to the car?

A. Nothing happened to the car? Of course something happened to the car.

Q. Well, was it smashed?

A. The right rear fender was torn.

Q. That's all that happened to the car?

A. I don't know, I did not examine the car. I saw that the right rear fender had a slit in it.

Q. And nothing happened to the car?

A. I don't know. The car was taken, eventually, and a limousine from the American Legation took me to the legation, and Neil stayed there with the car and the police. I don't know anything about it.

Q. Was the car replaced thereafter?

A. Neil drove to Paris thereafter, I think in a different car, yes.

Q. Wasn't that other car furnished by the insurance company?

A. I don't know.

[fol. 235] Q. Didn't you so testify.

A. I don't know.

Q. You don't know?

A. No, no.

Q. Do you know what became of that other car?

A. No.

Q. To this day?

A. No. I did not see anything at all about it.

Q. You want his Honor to understand, Madam, that having been in a car which was hit by a speeding train, the car was shoved across in some fashion and you were conscious throughout and you opened the door and walked out of the car, is that what you are telling his Honor?

A. Yes.

Q. Fine. Then, will you please tell me, if you are telling that to his Honor, whether you were telling the truth when you testified just yesterday in answer to your counsel's question: "Q. And did you sustain any injuries as a result of that accident? A. I was thrown." Were you thrown, Madam?

Mr. Winsten: I object to the form of question, if your Honor please.

Mr. Rosenblatt: This is cross-examination, your Honor.

Mr. Winsten: Just a moment. The question was: were you telling the truth; and there is no inconsistency between the question just put and the witness' previous answer.

Mr. Rosenblatt: Well, it is one thing to be thrown out of a car and another thing to just walk out of it.

Mr. Winsten: She said, thrown. She might have been thrown in it.

Mr. Rosenblatt: Why don't you testify, Counselor.

Mr. Winsten: I am not testifying.

The Court: Come along.

[fol. 236] Q. Please answer the question.

A. Of course I was telling the truth. Is that your question?

Q. That's right.

A. Yes.

Q. Well, where were you thrown?

A. My body was thrown like that.

Q. Tell us where.

A. Nowhere.

Q. So that you were not thrown?

A. I went back and forth in the car, that's all; and I said that I did not sustain any visible injuries.

Q. You recall that testimony?

A. I was not hit on the head and I did not have a cut on my leg or any such thing as that.

Q. And had you ever discussed this accident in Luxembourg before you took the stand yesterday?

A. What do you mean had I discussed it?

Q. With anybody?

A. Certainly.

Q. And you talked with your lawyers about it?

A. Yes.

Q. And they told you they were going to ask you questions about the accident in Luxembourg, didn't they?

A. I don't know that they told me that they were. I have discussed many things with the lawyers.

Q. Did they tell you that they were going to discuss such an accident in Luxembourg with you?

A. No, no, no. Did my lawyers tell me?

Q. Yes, did your lawyers tell you?

A. No. Why they were discussing it?

Q. Yes-

A. Oh, no, I don't know what you are talking about.

Q. What's that? You don't know what I am talking about?

A. I don't know what you are talking about. You mean what my lawyer told me?

Q. Yes, that's right.

A. I related to them what went on.

[fol. 237] Q. Now, Madam, can you tell me how fast this train was going?

A. Oh, no, I cannot tell you. This is sort of in the middle of the town.

The Court: What kind of a train is this—a trolley car or a regular train?

The Witness: They call it a train. It belongs to the Duchy of Luxembourg. I don't know. It has an engine. It is not a trolley car. It is an engine.

Q. It is a steam engine, isn't it?

A. I don't know.

Q. You don't know what kind of an engine?

A. I don't know if any steam——

Q. Was the engine pulling some cars?

A. I think there may have been one or two cars.

Q. And you opened the door of the car and walked out: is that right?

A. Yes, finally.

Q. And where did you go thereafter? Did you see a doctor?

A. You mean right then and there?

Q. Right then and there.

A. I was looking for my glasses.

Q. What's that?

A. I was looking for my glasses. They had blown off my nose.

Q. No, I am not asking you what you were looking for. I am asking what you did. What did you do?

A. I did not do anything. I waited there, and Neil told me that he would call the Legation. We were due at the Legation for lunch, and then he came back and said that a car was coming, and that I should go to the Legation for lunch.

Q. Now, that took a few minutes while he was seeing the police and calling the Legation, didn't it?

A. Yes.

Q. And you were looking for your glasses?

A. That's right.

Q. Where were you looking for your glasses?

[fol. 238] A. I was looking around the car. I looked around in the front seat of the car, and then I looked—I opened the door to see if they were down next to the door. They were not there. I got out and looked around, and then I ultimately found them in the back of the car.

Q. In the back of the car?

A. That's right.

Q. Had you been wearing them at the time of the accident?

A. Yes.

Q. Now, when did you first experience any pain as a result of that accident?

A. Well, later. I was feeling shock, I knew that. I was shaky from it. Then I had lunch at the Legation, and then after I became very weak; I had been shaky, and this has since been explained to me as being a form of shock that a person feels after any kind of a——

Mr. Rosenblatt: I move to strike out what has since been explained to her.

The Court: Strike it out.

Q. I have not got an answer yet? When did you first feel pain after this accident?

A. Well, much later in the day I felt very weak.

Q. What's that?

A. I say, finally a doctor came. Mrs. Mesta sent a doctor.

Q. Before the doctor came did you have any pain in your back?

A. I don't recall that, but Mrs. Mesta insisted that a doctor attend me, and I said, "Yes, certainly."

Q. Well, now, before the doctor came did you have any pain in your back?

A. I was—I don't recall. I was generally feeling very weak and shaky.

Q. Did your back feel bad?

A. Well, eventually I felt very weak all over and I could not rise up.

[fol. 239] Q. Now, I am asking about your back, Madam, when you had this accident.

A. All over.

Q. Pardon me. When you had this accident did your back feel bad? I am interested in your back now, Madam!

A. I am telling you, all over, including my back, I felt bad.

Q. And that was immediately after the accident?

A. No. This comes later, after I began to realize that I felt very weak and very tired.

Q. So that your back did not feel bad at the time of the accident, but much later, is that right?

A. Well, it is hard to say, because this was—I don't

know how to say it, because it went through the day. I had to go through a luncheon, you see.

Q. Well, now, here is what I want to know. You testified yesterday that possibly you had complained in the fall of 1949 about pains in your neck and spine to Dr. Younge, and you have testified here today that through this period until the spring of 1951 you were seeing doctors for whatever purposes. Now I want to know whether from 1949 to this accident in Luxembourg, was that the first time that you had had any complaint with your back?

A. No, I would not say that. Whenever I get tired my back gets bad and my muscles.

Q. Is that a fair statement about the period of time, even before this accident in Luxembourg?

A. I think it is a fair statement about anybody.

Q. No, I am asking only about you, only about you.

A. Does my back get tired? It certainly does, and it aches.

Q. And that was true before the accident in 1951, it did get tired and it ached?

A. Certainly, after long motoring, ten hours a day of motoring, believe me.

Q. And you don't think this accident helped it any, do
[fol. 240] you?

A. I certainly do not. Nothing helped it.

Q. And after the accident and a doctor was sent to see you, he said that you had to have X-rays of your back, didn't he?

A. Yes.

Q. Well, did you tell him that you already had X-rays about your back previously?

A. No, no.

Q. Not at all?

A. I did not discuss anything in particular with this man. He just wanted to look me over generally.

Q. And when you got to Paris you had some X-rays, did you not?

A. Yes.

Q. And that was at the American Hospital at Paris?

A. That is right.

Q. Did you tell those people that you had had trouble with your back before?

A. I don't recall that. They talked about what had happened. I did not go into any history with these people. They took the X-rays, and asked me what I recalled about this accident in Luxembourg, and I said that I had been thrown, my body had gone back and forth, although I had not hit anything. When the car goes forward, you going one way and when it stops you snap and go the other.

Q. Do you know when that accident happened that Mr. Vanderbilt was catapulted through the air?

A. Oh, please—no.

Q. You don't know that?

A. He was right beside me, I know that.

Q. And he was not thrown out of the car either?

A. No, no.

Q. Very good. Now, tell me, when you got to Paris and you had the X-rays and you started to take some treatment, as you testified to his Honor, you say that Mr. Vanderbilt complained because this was a male physician, a young, [fol. 241] male French physician, is that your testimony?

A. Yes, he was there when I took a treatment.

The Court: When you took a what?

The Witness: The doctor treated me. The hospital sent me to this doctor, and Mr. Vanderbilt stood in the room while he treated me.

Q. And did anybody suggest that you might have a female nurse to take care of that therapy?

A. No. He just did not want me to do it, to go to this man.

Q. He objected to the man. Now, did you say anything about going to a woman?

A. This is a doctor that the hospital recommended. I would not know anything about any woman.

Q. Did you ask him to go to any hospital and ask to have a woman take care of you?

A. We were——

Q. Yes or no.

A. No, I don't recall anything about that.

Q. And did you have any further treatment before you got on the boat to come to America?

A. No.

Q. Now you got on the S. S. America, is that right?
A: Yes, we did.

(At this point there was a five-minute recess.)

(After recess.)

PATRICIA VANDERBILT, resumed:

Cross-examination.

By Mr. Rosenblatt (continued):

Q. Do you recall about the third night of that trip?
A. Yes.

[fol. 242] Q. Well, please tell the Court what happened at that time.

The Court: Come along now, Madam.

The Witness: All over again?

The Court: Well, he has a right to ask you.

A. This is the night when we had entertained the children early in the evening, and then they had gone to bed, and then we stayed, and we were with a group of people dancing. I did not feel well because it was very humid, and I was still feeling very shaken from this other thing in Luxembourg, and I asked Neil a couple of different times to please let's go to sleep and he would not go. He said, no, he wanted to dance, and I sat at the table with these other people. Anyway, finally we all left. Neil and I went to our suite, got ready, and finally got into bed.

The Court: A little louder, please.

A. (Continuing) And then he started all of this turning off and on the light and going to the bathroom and making a lot of noises and I asked him to stop, and he would not stop; and then he would keep it up and then he did this grunting that he does occasionally.

I got up and took a pillow and a blanket and went into the sitting room and said that I was going to sleep there, and he followed me and said, "Don't be silly, don't be silly, and come on back." So I took the blanket and took the pillow, and I went in ahead of him, and he hit me, he threw the pillow at me in the back of my head.

[fol. 243] I said, "Neil, this is too much, I am going to go and sleep with Nanette." And I went then into the bathroom, and he came in behind me and wheeled me around and shook me, and then he threw me into the bath tub. I must have blacked out then because when I remembered things he was not there. When I recalled them he was not in the bathroom and I had no recollection of him leaving the bathroom, so then I managed to pull myself up and out of the tub, and I came out of the bathroom door, and I could see him, he was up at the porthole in the sitting room. He was kind of doing something with his hands.

I went through the bedroom into the sitting room, and then I got a glimpse of his face, and he didn't—anyway, I was very frightened, so I then went out into the ship's hall outside of the suite door. I went down two doors and banged on the child's cabin door.

Q. Now may we stop there for a moment, and I want you to tell me how many times you have told this story, and to whom?

A. I have told it to my lawyers.

Q. You mean it to Mr. Winsten?

A. I have told it to other lawyers.

Q. When for the first time did you tell it to any lawyers?

A. In late September of 1952.

Q. And that was where?

A. That was in California.

Q. Now, had you ever told it to any lawyers before late September of 1952?

A. No. I said that the first time I told it to any lawyers.

Q. And when you tell the story and describe Mr. Vanderbilt's standing at a porthole, what is the significance of his standing at a porthole? Why do you tell us that?

[fol. 244] Mr. Winsten: That is objected to, if your Honor please. The witness has related an incident.

The Court: Yes, I would like to hear it.

Q. Did his standing at the porthole frighten you?

A. The whole appearance of him frightened me, that he had not helped me.

Q. Now, did you have an impression that he was trying to kill you?

A. Right then I just was very frightened. I don't know what you mean.

Q. Well, when you got out of this bath-tub into which you say he threw you and you came back into the living room and you saw him standing across the sitting room looking out of a porthole, and you were frightened, you say, did you think that Mr. Vanderbilt had tried to kill you?

A. Well, I don't think I thought so right then. I was thinking that I was very afraid of him.

Q. You were very afraid of what—that something more might happen to you?

A. Yes.

Q. Is that right?

A. Yes.

Q. And why were you very afraid of him?

A. He had just done this thing to me, and then when I am aware of anything he is not helping me. I mean the whole thing.

Q. You mean you were afraid of him because he had not stood there and helped you back out of the bath-tub, is that it?

A. I was afraid of his appearance also. He looked completely different.

Q. You said he looked very white?

A. Yes, he looked very strange to me.

Q. Do you think he had been throwing up, Madam?

A. I don't know anything about that.

Q. Well, had either of you been drinking that evening?

A. There had been some drinking, yes.

[fol. 245] Q. As a matter of fact, there was quite a lot of drinking, wasn't there?

A. I drank very little, if you are referring to me. I think I had one or two drinks.

Q. That's all?

A. Yes, the whole evening.

Q. You did not drink any wine?

A. No, I don't drink wine ever.

Q. You only drink whiskey?

A. I drink Scotch and water.

Q. Did you have any of that that night?

A. I think I did, yes.

Q. And you said that you were feeling badly that evening in question, is that right?

A. It was extremely humid and close in the ballroom. It has a very low ceiling with a dome in it and it was very bad air.

Q. And they were having a dancing contest that night, weren't they?

A. I don't know whether there was a dancing contest that night. There was a contest on the boat on one night. I don't think it was that night.

Q. And how many people were at your table?

A. At various times various numbers of people.

Q. And were they drinking?

A. Of course we had children earlier and they were not drinking.

Q. I understand that. I am talking about after the children left and the grown ups took over.

A. Yes, I think they were.

Q. And did Mr. Vanderbilt seem to be drinking?

A. Yes.

Q. Was there any liquor kept in your cabin?

A. Well, we had liquor from Europe, rare liquors that he wanted, liqueurs, mostly, and brandies.

Q. I am just talking about ordinary liquor?

A. I don't recall any.

Q. Would you say there was none there?

A. No, I could not say that.

[fol. 246] Q. And will you tell me whether or not at any time during that evening you had left where Mr. Vanderbilt was and wandered off?

A. I walked around the deck.

Q. And then you returned to where Mr. Vanderbilt was?

A. And I went to the ladies room before I returned to the ballroom, yes, and I had gone to the ladies room a couple of times during the evening.

Q. And had you been away for any period as long as an hour?

A. It depends on when you are referring to. I always put my child to bed even if she has a nurse.

Q. I am asking about the grown-ups took over. The child is in bed long ago now.

A. Oh, no. I walked around the deck for some air be-

cause he would not return to the cabin to go to sleep. I walked around the deck to get some fresh air and then I went to the ladies room and then I returned to the ballroom.

Q. Now, Madam, when you were leaving the cabin, the sitting room, or the bedroom, as the case may be, to go into this bathroom, why were you going into the bathroom?

A. I went—I was going to get a robe. I had only a night gown on. I had been to bed, you know.

Q. And you were going into the bathroom just to get a robe?

A. That's right.

Q. And then without any provocation at all the defendant came up and did all these things you described, is that right?

A. That's right.

Q. You did not have any fight with him at all?

A. No, no.

Q. You did not kick him in the groin?

A. No. There had been practically nothing happening, hardly any conversation.

[fol. 247] Q. Did you ever have any physical fight with Mr. Vanderbilt when you struck him as well as his striking you?

A. No.

Q. You never fought back?

A. No.

Q. Would you say that you never had a fight in your life?

A. I don't believe in physical violence and I don't fight.

Q. Have you ever had a fight?

A. As a child, it is possible.

Q. In your teens have you had a fight?

A. No.

Q. May I ask you whether or not you were transferred from the El Raturo Home for Delinquent Girls in California to the Ventura Home for Delinquent Girls because you had a fight with another girl?

Mr. Winsten: Objected to, if your Honor please.

Mr. Rosenblatt: I have got some authority on that, your Honor.

The Court: Objection sustained.

Mr. Rosenblatt: May I have an exception, and may the record show that this is cross-examination and I have every right to attack the witness' credibility.

Q. When you returned from the ship's hospital where did you go?

A. To our suite.

Q. And did you stay there until the boat docked?

A. Yes. The boat docked then the following morning.

Q. Did you spend the last night on board in your suite?

A. Yes.

Q. Was your husband there?

A. No.

Q. He was not there?

A. No.

Q. Did you know where he was?

A. Yes.

[fol. 248] Q. And you were alone in the cabin, is that it?

A. No.

Q. Well, who was with you?

A. My daughter and the nurse.

Q. And you are talking about the cabin that had been up to that time occupied by you and Mr. Vanderbilt?

A. That's right.

Q. Now, when you saw Mr. Vanderbilt in the ship's hospital you say he sat in a chair at the foot of the bed and he said, "Do you want to marry the guy?" Now, did you know who he was talking about?

A. No.

Q. And thereafter you say as follows: "And I said"—this is your testimony to your counsel—"no, I don't know. I said, 'Please, if you have anything on your mind, you must come right out and say,' and he said, 'Well, it was this man who had been in the party the night before.'" Now, you just told his Honor that there were a lot of people at that party, didn't you?

A. That's right.

Q. I assume that is a lot of men and a lot of women, is that right?

A. Yes, there were other people there.

Q. A lot of them, you said, many through the course of the evening after the grown-ups took over?

A. Yes, people would come and go, sit at the table and leave again, and then other people would come and sit. This is aboard a ship.

Q. And Mr. Vanderbilt picked out one person and taxed you with having paid attention to that person, is that right?

A. Yes.

Q. Out of all those people that had been at the table?

A. That's right.

Q. Now, had you ever known this person before that Mr. Vanderbilt referred to?

A. I had only met him once. Mr. Vanderbilt introduced me to him sometime many months before, in a restau- [fol. 249] rant. He stood at the table, there was an introduction, and he went away. That's the only time I had, and then many months had gone by, and this man and his wife are on the boat.

Q. You had not seen him or his wife in Paris before you sailed?

A. No, no; no, no. My husband did not like this man.

Q. Oh, he did not like him before the episode on the boat?

A. He had told me about him, yes.

Q. And you were in Paris before you sailed, is that right?

A. That's right.

Q. And Mr. Vanderbilt was in England, was he?

A. That's right.

Q. And did you see anybody in Paris?

A. Oh, certainly, lots of people.

Q. Did you see this man?

A. No.

Q. Or his wife?

A. No.

Q. You are sure of that?

A. Positive.

Q. Now, when Mr. Vanderbilt said to you in the ship's accommodation that it was this man who had been in the party the night before, he was selecting somebody whom you had known before and who had just happened to be one of the many men in that party; is that right?

A. I did not say I knew him before. I have said that I

met him once at a table. I did not talk to him. I say, "How do you do," and many months go by and then this man and his wife happen to be on the same ship, and my husband has known this man for many, many years.

Q. But I am only asking, of all the people—just answer the question and we will get along very fast—of all the people that stopped at that table at one time or another, that had been there, sat down at the table, or whatever they did at the table, he picked this one fellow?

A. That's right.

[fol. 250] Q. Is that right?

A. Yes.

Q. Didn't you think that was strange, or were you used to it by then?

A. I was getting pretty used to it.

Q. In other words, this was not any new experience for you, was it, to be taxed with this kind of thing in 1951?

A. To be physically hurt is now a new experience.

Q. You had been physically hurt before that time, hadn't you?

A. He had pushed me down and held me down.

Q. But that was not really any physical hurt, is that it?

A. I had no injuries from it, but now my head is injured, and my head and my back.

Q. Madam, I am not a very good negligence lawyer, but I ask you whether or not up to August of 1951, when you were on the S. S. America and before this episode in the bathroom, had you ever been in any accident where a car in which you were riding was hit by a speeding train? Had that ever happened to you before in your life?

A. I have just told you that a train hit the car in Luxembourg.

Q. Now, please. Had you ever been in a car hit by a train before August of 1951, other than the time in Luxembourg?

A. No.

Q. No. Thank you. Now, you told his Honor that you have a nerve root irritation, do you remember that?

A. Yes.

Q. Well, how long had you had that?

A. That was determined——

Q. No; I asked you only how long you have had it.

A. I don't know how long I have it. It was determined——

Mr. Rosenblatt: Now, may it please your Honor, on cross-examination I am asking how long has she had it, [fol. 251] and I believe I am entitled to a direct answer.

The Court: Let me put it this way: when did you notice it for the first time?

The Witness: I learned it in California in the spring of 1952.

The Court: Is that after you came back from the S. S. America?

The Witness: That's right.

Q. You never had it before?

A. This is the first——

Mr. Winsten: That is objected to, if your Honor please.

The Court: She already testified to it.

Q. That's the first time you had it?

Mr. Winsten: That's the first time she learned of it, your Honor, that is the testimony.

The Court: I think I put the proper question to her. Let's get the question.

Mr. Rosenblatt: I want an answer to this question. Whether or not in the spring of 1952 was the first time she knew that she had a nerve root irritation.

The Court: That's what she said to my question. Read my question, Mr. Stenographer.

The Stenographer: "When did you notice it for the first time?"

Mr. Rosenblatt: I want to know when she knew it for the first time.

The Court: When you noticed it, is that the first time you knew it?

[fol. 252] The Witness: That's the first time I knew it.

The Court: All right, tell counsel when that was.

Q. When was that?

A. In the spring of 1952.

Q. Now, did you have a conversation sometime in the latter part of September or early October of 1951, with

your husband when you said, "Neil, I think now I have everything figured out"? Do you remember that?

A. We had a long talk then.

Q. You told him then you had known of his medical condition, is that right?

A. I said his mental condition.

Q. I beg your pardon. I am asking you whether you told him that you had known of his medical condition?

A. I think I said his mental condition.

Q. You say you did not say his medical condition?

A. I remember that this was the——

Q. No, no, you only testified yesterday. This is not a week later. This is only a day, isn't it?

A. That's right.

Q. Did you tell him that you had known of his medical condition?

A. I am almost sure I said his mental condition.

Q. And you said nothing about his medical condition?

A. Well, this takes in the whole thing, doesn't it?

Q. Oh, that's very easy, Madam. I read from the record as follows, at page 103: "And I told him that now and for several months last past I had known of his medical condition."

A. No, that is mental.

Q. That is mental?

A. Yes.

Q. So that you testified here incorrectly or the stenographer got it wrong, is that right?

A. I said mental.

[fol. 253] Q. Now, I follow the same sentence, I read it again: "I told him that now and for several months last past I had known of his medical condition and I knew now that he had some mental problems." Now, do you still say that you did not say anything about medical condition?

A. No, the whole thing is part of it in my mind.

Q. Tell us about the condition——

The Court: I have a notation here that she said she had known of his medical condition and mental problems.

Mr. Rosenblatt: That's right, sir, that's what I am trying to find out. I would like to know what his medical condition was and what his mental problems were.

Q. Can you tell us, please, Madam?
A. What is it you want me to tell you?
Q. I only want the truth.

Mr. Winsten: That is objected to, if your Honor please.

Q. (Continuing) About the conversation in 1951 that you testified to.

Mr. Winsten: I move to strike out the answer, and there is no question pending.

The Court: There is no answer. It is only a question that you are objecting to. The objection to the form of the question is sustained.

Q. Please tell me what you told Mr. Vanderbilt that you had known of his medical condition. Did you tell him anything about that?

[fol. 254]

A. I told him that I had seen this report.
Q. Well, when did you say a little while ago this morning that you had seen this report?
A. Early in the spring of 1951.
Q. You had not seen it in 1950?
A. No, no, this is just before sailing for Europe in 1951.
Q. Is that when you saw it?
A. That's when I saw it.
Q. How did you happen to see it?
A. At 1048 when I was cleaning his papers.
Q. You would go through his papers and that's where you found it?
A. Not going through his papers. I had to clean his papers because the maid had refused to do it.
Q. And when you saw this report did you take it?
A. No.
Q. Did you take it at a later date?
A. No.
Q. It was not yours, was it?
A. I considered it was very much my concern.
Q. Was it your property, that report?
A. He is my husband.
Q. When did you take it, Madam?
A. I took it sometime in June of 1952.
Q. You took it in June of 1952. Were you in New York in June of 1952?

A. No, no. He had it in his typewriter case in California and I took it out of it.

Q. And just kept it?

A. I wanted to talk to a doctor.

Q. Tell his Honor what else you kept of his property?

Mr. Winsten: That is objected to, if your Honor please. [fol. 255]. Q. (Continuing) In 1952.

The Court: I will allow it. Go ahead.

A. What do you mean?

Q. The films that you kept that belonged to him.

A. I don't have his films.

Q. You did have them, didn't you?

A. Anyway he says they are our films. I took them, he took them, my child is in them, I am in them.

Q. But you kept them, didn't you? You have not given him those films to this date, have you?

A. Oh, no, no. He has been lecturing now.

Q. Don't you know that in California, at the 1010 Laurel Wood House which you last leased, you had films which he had taken and he had demanded and requested that you turn over to him?

A. He made demand on the telephone about certain films, and I said, "Neil, I don't know what you are talking about." He said, "A couple of rolls of film had been sent there." I said, "I don't know what you are talking about." And I said, "There are many people here, I don't know, I am moving from one house to another"——

Q. This is after you had moved, Madam.

A. I am telling him. He says the films. We are at a prior time, in July or August, or something—I said, "I don't know anything about it. I have not seen anything."

Q. You have taken other property that belonged to him, haven't you? You have taken other letters that belong to him, haven't you?

A. Well, it just depends on what you mean.

Q. I mean that they were his personal property and you took them. Didn't you testify yesterday you took papers [fol. 256] out of his quarters in 1048 Fifth Avenue and secreted them on your person after you talked to your lawyer in February 1953? Didn't you testify to that yesterday?

Mr. Winsten: Just a moment. I don't know, your Honor, where this question begins and where it ends.

The Court: We were in 1952, I believe. Just take it chronologically.

Mr. Rosenblatt: I would like to say, whether chronologically or not chronologically, she takes this property, and I have a right to ask——

The Court: I am not barring you from that. I say, ask her at the time she took this medical report was something in 1952, and then you also asked her if she took some films.

Mr. Rosenblatt: That's right; and now I want to know if she took other things in 1953.

The Court: Go ahead.

The Witness: Why, yes, I have a lot of papers.

Mr. Winsten: Just a moment, Mr. Rosenblatt. I want the question that is pending clarified. Mr. Rosenblatt spoke for five minutes and I don't know what kind of a question we have now.

The Court: On what?

Mr. Winsten: He has propounded a question that lasted for five minutes and included statements and questions. Now let us get the question.

Mr. Rosenblatt: She answered it. Your client understands it.

[fol. 257] Mr. Winsten: There is a conclusion in that statement, your Honor.

The Court: All right, withdraw the question and answer and ask it again so that there will be no question about it.

Q. Have you taken at any time any personal property belonging to Mr. Vanderbilt from premises which are anywhere in New York?

A. Yes.

Q. Now I want to know, and I want you to tell the Court what the mental problems were that you talked about when you said you had a conversation with Mr. Vanderbilt in late September or early October 1951?

A. What the mental problems were?

Q. Yes.

A. I told him that I had seen this report.

Q. No.

A. I am telling you as to how I talked to my husband. What am I supposed to say now?

Q. Mrs. Vanderbilt, just listen to me one second. You said yesterday in answer to your counsel's question: "I told him"—meaning Mr. Vanderbilt—"that now and for several months last past I had known of his medical condition, and I knew now that he had some mental problems, and that to myself I would say that this was the reason he was attacking me." Now, that's what you told Mr. Vanderbilt, that's what you said yesterday.

A. Yes, but what is it you want?

Q. I want you to tell us what were the mental problems. You said, "I knew now that he had some mental problems." That's what you told your husband. Now, what were those mental problems?

A. Well, you see, in my own mind I took several weeks to try and figure it out, and then I was trying to relate to him what I felt about the whole thing, that his over-excitement——

[fol. 258] Mr. Rosenblatt: May it please the Court, I move to strike the answer out as unresponsive, and I ask that the witness be directed to answer me what she meant when she said "I knew now that he had some mental problems." What were those mental problems?

The Witness: I told him during this conversation, I said, "Neil, I know that you have always been bitter against your sister about certain things, and I don't think that these things are true, and you are building them up," and I told him that it was my conclusion now that his hatred for so many people, almost anybody you could mention he had something terrible to say about them, or he had reports on them, "and this I know is wrong. Not everybody can be that bad," and he must realize that.

Q. Are those the mental problems that you had reference to?

A. Oh, no. You see, he felt as if anybody was picking on him, and I was trying to convince him this is not true; he must know that people fundamentally are friendly, and he must learn how to feel that. He was always feeling that everybody was against him.

Q. Now, Mrs. Vanderbilt, please. You know yesterday afternoon after you testified about your schooling in dra-

matics we had really progressed. Questions and answers were rendered——

Mr. Winsten: I object to counsel's remark, your Honor.

Mr. Rosenblatt: I ask the Court to particular-note that because this record consistently shows a report by the reporter that the witness weeps, and I say that I want on [fol. 259] this record——

Mr. Winsten: I object to any statement that counsel makes in that respect.

The Court: The Court is here and the Court is observing the witness and the manner of the witness' testimony. It is for the Court to determine these things.

Mr. Rosenblatt: May it please the Court, is this the complete——

The Court: Because even if this case is appealed the record will not indicate the demeanor of this witness. I am the only one who observes that.

Mr. Rosenblatt: He also does. It says, "witness weeps," only of course on direct examination.

Mr. Winsten: Let the record indicate it on cross-examination then, too.

The Court: This has nothing to do with the case, gentlemen. Next question, please.

Q. You said, "If is because"—you are talking now to your husband—you said, "is it because of his extreme nervousness and hypertension." I ask you quickly, did he have extreme nervousness?

A. Yes.

Q. And did he have hypertension?

A. Yes.

Q. What is hypertension—high blood pressure?

A. Well, now, I don't really know the medical analysis.

Q. You used the word. What did you mean by it?

A. It is used about him. I took it from—used it from his medical report.

Q. You don't know, other than the fact that you used the word, what it means?

A. I take it from what the word itself says. It speaks for itself.

[fol. 260] Q. You have no other understanding of it? What did you think it means?

A. It means a very extremely tense person.

Q. It has nothing to do with blood pressure?

A. I don't know about the blood pressure.

Q. And you said, "The conclusions as to his mental condition." What were the conclusions as to his mental condition that you referred to in your conversation with him?

A. I was trying to explain to him the way things were appearing to me, the way he was now appearing to me, that I was putting a lot of things together, and I hoped that I was doing right in what I was trying to arrive at with him, so that we could come to a clear understanding.

Q. And did you arrive at a clear understanding?

A. He promised to go and see the doctor.

Q. Tell me, upon his statement that he would go and see a doctor, that was the end of this entire episode? You went back and lived together after that, did you?

A. Well, we worked together and lived together certainly.

Q. You were not frightened by him, were you? Were you frightened to be with him?

A. Many, many nights I woke up in fear.

Q. And was it a fear induced by anything he had done that night?

A. Yes.

Q. What, for example, and tell us when.

A. I could never understand why he did not help me.

Q. Why he did not help you do what?

A. Well, it is a normal reaction to help someone out when you hurt them; if you see that you have hurt them you attempt to help them or to call for help.

Q. You are talking about the episode on the "America"?

A. Yes.

Q. I am asking you about what transpired thereafter [fol. 261] to put you in fear of him on any occasion.

A. No, this whole thing kept going through my mind for quite some time.

Q. You told us there were specific instances and specific times when you woke up in fear of him, and I ask you whether it had anything to do with something that he had done on that particular occasion, and you said yes, so, now, tell me.

Mr. Winsten: Now, if your Honor please, I think there was a misunderstanding of the question. Counsel used the words "that night," and the witness had regard to the night on the boat. I think we ought to clarify it.

The Court: Do you understand the question now?

The Witness: I am saying that night after night I would wake up, about this boat.

Q. You testified at some length about the fact that he cried for two hours: do you remember that?

A. Yes.

Q. Do you think that is very normal for a man to do?

A. No.

Q. Did you tell him you thought that in itself was very abnormal?

A. No. I was pleading with him, through this whole time, and talking a great deal about my child, and about the nice parts of our marriage.

Q. Had he cried on any occasion previously in any discussion with you?

A. I don't think so.

Q. Had you cried?

A. I don't think so. I don't know.

Q. You said about his hatred for so many people; do you remember that?

A. Yes.

[fol. 262] Q. Will you explain it, please.

A. Well, throughout a certain period, even in general conversation, or we would see someone that he knew, he would proceed then to tell me about them, and some of these people were extremely important in the Government, or in various phases of life. I just recall that during this time, he rarely had anything nice to say about anyone; everyone was always a crook or something. Even his own sisters. He even said things about very immediate members of his family.

Q. Had he said any of those things, or made any of those kind of remarks before you were married, when you went with him?

A. I don't recall too much of that. You see, that was an entirely different sort of time in our life.

Q. Well, now, madam, you worked for him as well as went out with him socially before you married him?

A. I didn't work right with him. You see, I worked at the library during the day.

Q. Didn't you get together with him on the results of your labors for his benefit?

A. No, I was doing——

Q. You said you were doing research.

A. Yes; and then I would type it at my house.

Q. Then, you would give it to him, wouldn't you?

A. Yes.

Q. Well, at times, you had, then, business conferences on what was to be researched and what was to be typed up?

A. I knew what I was supposed to do before I did it.

Q. Did you see this man a great deal before you got married to him?

A. Yes.

Q. You had known him for about a year and a half before, or even more?

A. Yes.

Q. I think you said around the Spring of 1937 you met him—I mean '47?

A. '47.

[fol. 263] Q. Is that right?

A. Yes.

Q. You must have heard him talk about various things and people, didn't you?

A. Yes.

Q. Was it after he married you that he then became this bitter, hating sort of fellow toward other people?

A. You see, he was trying to get into various different business ventures. This is when I became closely involved in business discussions. I was not in any business discussion before we were married.

Q. But, he talked about people?

A. Well, when we would be out. But, you see, it is just different. I don't know how to tell you.

Q. Well, in other words, you are telling me that after you got married he started talking about people in a very bad manner; is that right? Is that right?

A. Yes. You seem about different things——

Q. He talked about you the same way?

A. No. Should he go into business with this or should he not. He knew this and he knew that and he knew the other thing about that person. He didn't think he should go into business with him.

Q. He talked about people in general in a very bad manner?

A. I began to notice it; yes.

Q. He talked about you in the same way, also?

A. Now he does.

Q. Didn't he then?

A. To my brother he was saying things, and to me he was saying what I related here.

Q. Your brother came quite frequently during the period of your marriage to see and visit with you, didn't he?

A. When he was in Los Angeles on various occasions; yes.

Q. Didn't he keep up a correspondence, also? Did you hear from him by letter or mail, or something?

A. Oh, very rarely.

[fol. 264] Q. Did you write to him or did he write to you?

A. Rarely.

Q. Is your brother an honest man?

A. I consider him so.

Q. Is he a reliable fellow?

Mr. Winsten: That is objected to, if your Honor please.

The Court: Objection sustained.

Q. Would you take a statement that he made about another person as correct or incorrect?

Mr. Winsten: That is objected to, if your Honor please.

The Court: Sustained.

Q. Do you know his handwriting?

A. Not particularly. We rarely corresponded.

Q. I show you a paper writing, from which I have taken off everything except the words which you see here, and ask you whether that is his signature?

Mr. Winsten: That is objected to.

The Court: I will let her answer yes or no.

The Witness: I don't know.

Q. You don't know?

A. No.

Mr. Rosenblatt: Mark that letter for identification, please.

(Same is marked Defendant's Exhibit E.)

[fol. 265] Q. Did your brother Dave at any time ever say to you that Mr. Vanderbilt had been very kind, considerate and loving to you?

Mr. Winsten: That is objected to.

Q. If you know?

Mr. Winsten: That is objected to.

The Court: I will allow it.

The Witness: Did my brother say this to him?

Q. If you know?

A. No; I don't think so.

Q. You don't know whether he ever said that to you?

A. No. Would you read it to me, tell me again?

Q. I am asking you—would you read the question back, please, sir?

(The question was read as follows:

"Did your brother Dave at any time ever say to you that Mr. Vanderbilt had been very kind, considerate and loving to you?")

A. No.

Q. Did your brother ever say to you that he thought that you were a very lucky girl to have such a fine husband?

Mr. Winsten: That is objected to, if your Honor please.

The Court: How is that relevant, counselor?

Mr. Rosenblatt: She has testified as to what her brother said to Mr. Vanderbilt at various times.

[fol. 266] The Court: She testified what she heard Mr. Vanderbilt tell her brother.

Mr. Rosenblatt: I am asking her whether she ever heard her brother say this to her.

The Court: Objection sustained.

Mr. Rosenblatt: Sir?

The Court: Objection sustained.

Q. In your presence or hearing, did you ever hear your brother say to you, in Mr. Vanderbilt's presence, or with-

out his presence, that you were a very lucky girl to have such a fine husband?

Mr. Winsten: That is objected to.

The Court: Objection sustained.

Q. Did you ever hear him say it to Mr. Vanderbilt, in your presence?

A. No.

Q. When was the last time that you had sexual relations with Mr. Vanderbilt?

A. Just before he went to Europe the last time.

The Court: When was that?

The Witness: In 1952.

The Court: What month?

The Witness: In June or July.

Q. Of 1952?

A. Yes.

Q. Do you remember testifying to an episode when he took your rings?

A. Yes.

Q. Can you tell us when that was?

A. That was early in 1952.

Q. Can you place it any better than that?

A. It would be in March or—it was just shortly before Easter of that year.

Q. Did you and he occupy separate bedrooms at that time?

A. We almost always did.

[fol. 267] Q. You said——

Mr. Rosenblatt: Strike that.

Q. You told the Court that at this time he said something about doing something to you, or disfiguring you in some way; do you remember that?

A. Yes.

Q. What did he say on that occasion?

A. He said that maybe he should have—something that he should have done a better job on the boat, and, you see, he had said to me——

Q. I can't hear you.

The Court: Madam, you will have to speak louder.

The Witness: He said on this same night, you see, along with taking the rings—he said then he was going to take all of my clothes, and that nobody would look at me again when he got through with me.

Q. Didn't you say something about him remarking that he should have finished the job on the boat, or something?

A. Yes.

Q. Did you want the Court to understand that the episode on the America was an attempt on his part to kill you?

A. This is what he had said.

Q. When he told you that, did you understand, then, that what happened on the America was an attempt by him to kill you?

Mr. Winsten: I object to that. I don't think the witness' understanding has anything to do with it. She is simply repeating a statement made by the defendant.

[fol. 268] The Court: I think it is relevant to show——

Mr. Rosenblatt: May I be heard?

The Court: (Continuing) —on the claim of cruel and inhuman treatment.

Mr. Winsten: I will withdraw my objection.

Mr. Rosenblatt: Would you read the question back?

(The question was read as follows:

"When he told you that, did you understand, then, that what happened on the America was an attempt by him to kill you?")

The Witness: Well, it is hard for me to say what I was thinking.

The Court: What were you thinking, if anything, madam?

The Witness: I was extremely upset. He had been hammering at me for a long time.

Q. You said to the Court, "Several times during this period he had said that perhaps he should have finished the job on the boat." Did you so testify?

A. He had said that to me; yes.

Q. When he said that, did you understand that he had attempted to kill you on the boat?

A. I was doing my very best not to think of things in that light.

The Court: What did you think, madam?

The Witness: Well, you see—I knew that he was mentally disturbed. I only wanted him to straighten out——

[fol. 269] Q. Mrs. Vanderbilt, I am going to come back to this question of whether he attempted to kill you, and whether he did thereafter; but you just used another word which is very good for the front pages, mentally disturbed. You knew he was mentally disturbed, you said. When did you first know he was mentally disturbed?

A. I had seen this report.

Q. No. Please tell me when you knew he was mentally disturbed for the first time?

A. Well, when he started all of this about his sister and about the——

Q. You knew then in the beginning of 1950; is that right?

A. Well, I didn't know anything then.

Q. I am asking you, when did you——

Mr. Winsten: Please let the witness——

Q. Please answer the question.

Mr. Winsten: I submit that the witness should be permitted to answer.

Mr. Rosenblatt: May it please your Honor, it is perfectly all right for the witness to throw terminology all over the place and then back out of it. I want to know——

The Court: Let's see what the answer is.

Q. When for the first time did you know that Mr. Vanderbilt was mentally disturbed?

A. You see, I don't know how to answer it because I knew he was acting wrongly in 1950.

Q. Was that the first time that you would consider him mentally disturbed?

A. I cannot say that I knew he was mentally disturbed.

Q. You just said that to the Court a few minutes ago.

[fol. 270] Mr. Winsten: I submit——

The Court: Let her finish the answer. Go ahead and continue. You can't say at that time that he was mentally disturbed.

The Witness: I knew that what he was proposing to do was wrong. This is wrong thinking.

Q. Are you a psychiatrist, madam?

A. No, sir.

Q. Did you ever study medicine?

A. No, no.

Q. Well, when, please—now, tell us when, please, for the first time did you know he was mentaly disturbed?

A. I saw this medical report.

Q. That was the first time you knew that he was mentally disturbed: is that right, by looking at a medical report?

A. I knew before that that his thinking was wrong, and that his——

Mr. Rosenblatt: May it please your *your* Honor, I ask that the witness be admonished to answer my question. It is a fair question.

The Court: I think she is answering it. Go ahead.

The Witness: I say, I knew before that that his thinking was wrong. This had crossed my mind, these things were wrong. I told him they were wrong. Now, if this is mental, so be it. I don't know. I wasn't thinking of it in that way. Then, I saw this report about him, and I read all of these things and, of course, they are now in my mind.

Q. You mean today they are in your mind?

A. That these are mental disturbances.

[fol. 271] Q. That is your opinion after reading a medical report; is that right?

A. Yes; and after talking to Neil.

Q. You decided he was mentally disturbed, didn't you?

A. It says so, and I believe it.

Q. You now believe he was mentally disturbed way back in 1950, when he was talking to you about his sister?

A. I think all of such things must be.

Q. Was he mentally disturbed at the time he married you?

A. Well, now, he seemed very wonderful to me at the time I married him. I wasn't thinking of such things.

Q. Is it your standard of thinking that if everything goes well with you, then he is not mentally disturbed; if things go badly, he is?

A. When he is happy, then everything is completely different; everybody around him is then happy.

Q. And he is not then mentally disturbed, when he is happy?

A. No. He is not then showing all of this anxiety.

Q. So, you believe that it is due to unhappiness that he was mentally disturbed?

Mr. Winsten: I object to the form of the question. That was not what the witness testified to.

The Court: Sustained as to form.

Q. You say that he was mentally disturbed because he was unhappy?

A. Do I say that?

Q. Yes.

A. I thing he was very unhappy about his sister and the will and the mother's health.

Q. And he was then mentally disturbed?

A. Then he seemed to become——

Mr. Winsten: I submit, if your Honor please, the witness is not a psychiatrist.

[fol. 272] The Court: All right. She has answered it. I think we have had enough of this. Let's go to another subject.

Q. Do you recall that Mr. Vanderbilt was saying to your brother that you were having all of these things with these men; do you remember that?

A. Yes.

Q. That is, your brother Dave?

The Court: Yes or no, please.

The Witness: Yes.

Q. Is that your brother Dave?

A. Yes.

Q. And these men, are they the ones you have mentioned up to the present time?

A. From time to time he had talked to my brother, yes. These are the men.

Q. You know who he was accusing you of infidelity with, didn't you?

A. Yes.

Q. Did he mention anything about a Charlie Isaacs?

A. Well, that is the man who is connected with the hat episode. The hat belonged to Mr. Craig, Neil said, "No, it belongs to Mr. Isaacs."

Q. Did he say anything about a fellow named Frederick Grundman?

A. He said that over the telephone in September, sometime, of 1952.

Q. You knew who Mr. Isaacs was, and you knew who Mr. Grundman was; is that right?

A. At the time that he said it to me on the telephone, I did not know who Mr. Grundman was. And then, I found out that Mr. Grundman and his wife are these young people that this young girl—they were friends of this young lady I have staying with me in September. They are young college students.

Q. When you went to Europe—I mean, when you found that your husband had gone to Europe in 1952—by the [fol. 273] way, he had a trailer built in Los Angeles, didn't he, before the political convention?

A. He and Mr. Beyerman, a trailer manufacturer.

Q. Did he take that trailer to Chicago?

A. The two of them went to Chicago.

Q. Did he take the trailer there, as far as you know?

A. The trailer was there. I think Mr. Beyerman took it.

Q. Howsoever, did Mr. Vanderbilt go to both the Republican and Democratic national conventions?

A. No. He stayed for the first one, whichever one that was, and then he didn't stay for all of the second one, because it is my understanding that he had to sail before that was over.

Q. Did he come back to California in between the two conventions?

A. For a day or two.

Q. You saw him then?

A. Yes.

Q. You knew that he was going to Europe?

A. Yes.

The Court: What year was that?

Mr. Rosenblatt: '52, your Honor.

Q. You say that you got mail from him; is that right?

A. Yes.

Q. Were those letters friendly?

A. They were all right. He said some things in some of them that weren't.

Q. But, they were in a friendly spirit, as a husband to his wife, weren't they?

A. He was asking me again, in one of them——

The Court: Asking you what, madam?

The Witness: To ask this doctor in Los Angeles, this doctor who was the father of one of my child's friends he said that I should tell this doctor that he had Federal [fol. 274] reports that he had been convicted of something to do with narcotics five times. I had been over this again and now Neil was writing it again to me.

Q. Do you have those letters?

A. I don't know. I have many letters. I don't know what all I have.

Q. You received a number of letters from him while he was in Europe, didn't you?

A. I received some; yes.

Q. Your daughter received some, too; isn't that so?

A. I don't remember whether she received any.

Q. Tell me, did you write to him?

A. Yes.

Q. Frequently?

A. Well, I had written him, and I had cabled him. I don't know how many times.

Q. Were those friendly communications?

A. I think so; yes.

Q. You knew that he was about to return on the 2nd of September?

A. Yes.

Q. Where was your daughter during the summer of 1952?

A. She was with me. She was in the hospital part of the time.

Q. She was with you in California?

A. Yes.

Q. She had gone to school during the winter of 1951 1952, had she, in California?

A. No. She was in school here part of the last part of 1951. She was in school here in New York.

Q. And then in California beginning in '52?

A. She was in school out there in '52; yes.

Q. Can you tell us the name of the school?

A. Westlake School in California, and Miss Hewitt's School in New York.

Q. Can you tell me when arrangements were made for her to reenter school in the fall of 1952, when the school term would commence there?

A. When?

[fol. 275] Q. At any time.

A. No arrangements had been made.

Q. Did you expect her to go to school?

A. Of course.

Q. When you first saw the house at 1010 Laurel Way, which is the house I think you leased in September 1952, did you inquire as to the adjacent school for your daughter?

A. No.

Q. Had you expected that when you occupied this 1010 Laurel Way house that your daughter would attend school in the near vicinity?

A. What are you talking about?

Q. 1952, madam.

A. What month, Mr. Rosenblatt, because——

Q. September, 1952; that is when you took 1010 Laurel Way.

A. We had looked at this house before.

Q. What is that?

A. We had looked at the house before.

Q. When you had looked at it before, had you talked about what schools there were?

A. No, because Neil was so undecided as to what to do.

Q. There came a time when you signed a lease in September, 1952; is that right?

A. That is right.

Q. And you moved from whatever other house there was to this 1010 Laurel Way?

A. Yes.

Q. Did you find out when the school term commenced, and where your daughter was to go to school?

A. Much later, because then Neil was on the telephone——

Q. I am not asking you about Neil on the telephone. When did you find out where the school was, and when the term began?

A. Sometime later on; about mid-September, I guess.

Q. When did the term commence?

A. It starts right after Labor Day.

[fol. 276] Q. Your child was late in getting entered, wasn't she?

A. Yes.

Q. She was entered in whatever the school was?

A. Yes.

Q. Did she continue to attend that school?

A. She stayed there until February.

Q. Of 1953?

A. Yes.

Q. Had you had any discussion with Mr. Vanderbilt at any time with respect to the child staying steadily in one school instead of being switched to different schools? Was that ever a subject of conversation?

A. Well, not particularly.

Q. Did you like the idea of the child switching from school to school?

A. I didn't particularly like it; no.

Q. Didn't you talk to Mr. Vanderbilt about that at any time?

A. I may have. It isn't particularly vivid in my mind.

Q. Mr. Vanderbilt was very fond of Nanette, wasn't he?

A. He seemed to be; yes.

Q. She used to call him Daddy, didn't she?

A. Yes.

Q. And didn't he discuss with you, or you with him at any time those matters affecting the child's best interests?

A. Yes.

Q. Didn't you discuss the fact that it would be good for the child to have a continuity in the same school?

A. The only thing concerned there was that I didn't like to take her out of school before the term ended, in order to go to Europe. I like her to finish. But, she was taken out a couple of times.

Q. Hadn't you talked to him about the fact that you wanted the child to have a permanency about her schooling rather than to be picked up and carried off at different times before the term ended or anything like that, to suit [fol. 277] Mr. Vanderbilt's convenience as to wherever he would be?

A. I don't recall too much about this.

Q. Weren't you interested in your child's schooling?

A. Oh, please, Mr. Rosenblatt.

Q. I am sure you were.

A. It was always of great concern to me.

Q. Wasn't this a matter of great concern to you to have the child stay in a school permanently and do like other children, rather than being entered late or taken out early, or brought to New York, or taken to Europe, or whatever the situation was in the household?

A. It disturbed me. Is that what you want to know?

Q. Yes.

A. Yes; of course.

Q. Did you ever discuss that with Mr. Vanderbilt, the fact that you were disturbed about that? Didn't you ever discuss that with him?

A. I had several times asked Neil to slow down and sit in one place and calm himself down, and he didn't need to run around all over the world, and take a little time to get things straightened out, and just sit, and he could write. Yes, this is all in the same thing; it would be good for all of us.

Q. That is right. One of the things you discussed with him was that it also would be very good for the youngster, wouldn't it, to have a permanent place, where you have a permanent home, stay there and go to school, and have the same little friends all the time, rather than being picked up and moved around?

A. He never made plans to stay anywhere permanently —never. He wouldn't do it.

Q. I understand that he wouldn't do it. But, you remonstrated with him about it, didn't you? Did you not say it would be better for him and everybody else if he did it, if he stayed put in one place?

[fol. 278] A. I said I wanted him to take time to stay in one place for awhile, somewhere in the country, and calm himself down.

Q. In that connection, did you say to him that you didn't approve of all this travelling here, there, and all the things that he did from one day to another?

A. No.

Q. You never said that?

A. No.

Q. Did you ever say to him that you didn't see any reason for these trips to Europe?

A. I said to him that everything—he kept saying he was so exhausted from it all, and people breaking the film when he was lecturing, and he had too much trouble doing it. I said, "Well, why don't you stop it?"

Q. Did you urge him to stop it?

A. I don't know what you mean. I asked him to please, if he felt that way—everything was too difficult, to please stop.

Q. You had met, over a period of years, the late Mrs. Vanderbilt, hadn't you, the late Mrs. Cornelius Vanderbilt, Sr.?

A. Yes.

Q. She was a pretty old woman, wasn't she?

A. Yes.

Q. And you were aware of her illness?

A. Yes.

Q. Were you aware of the seriousness of it?

A. Yes.

Q. Had you at any time before the year 1952 expressed concern about Mrs. Vanderbilt's illness, the fact that you thought she was weakening?

A. Well, I don't recall discussing it. I was concerned, yes; but I knew nothing could be done.

Q. Did you communicate or keep advised with any members of the household of Mrs. Vanderbilt, Sr. as to her health and her condition?

A. I sat at her bedside many times during the day.

Q. What about during the summer of 1952?

A. I was not there.

[fol. 279] Q. No. But, I mean, did you keep yourself informed and advised about her health?

A. Well, yes. Neil told me how she was.

Q. Neil was in Europe. Did anybody from New York?

A. He wasn't in Europe all the summer of '52. He was only there in August.

Q. During August, when he was in Europe, did you hear from anybody as to the state of health of his mother?

A. No.

Q. You didn't know anything about that?

A. No.

Q. Didn't know whether she was better or worse?

Mr. Winsten: I don't see the relevancy of this, your Honor. I object to this line of questioning.

The Court: How is that relevant?

Mr. Rosenblatt: I would like, with your Honor's permission, to develop, with a few more questions, as to the situation, which was testified to about early September, 1952. I am devoting myself to that period of time.

The Court: How would whether she inquired about her mother-in-law's condition be relevant?

Mr. Rosenblatt. As to whether or not she knew in the latter part of August, 1952 that Mrs. Vanderbilt, Sr. once again wasn't expected to live.

The Witness: No. I talked to Neil on September 2nd, and about the second or third question I asked "How is your mother?"

Q. What did he say?

A. He said "About the same."

[fol. 280] Q. He didn't tell you she was any worse?

A. No.

Q. Did you talk to anybody, like Mrs. VanName, who sent you the checks every month?

A. No.

Q. By the way, throughout your married experience, you did receive checks by the generosity of Mrs. Vanderbilt's mother; isn't that so?

A. Yes.

The Court: That is the $1300 a month?

Mr. Rosenblatt: That is right.

Q. Did you know that Mrs. Vanderbilt's health was very precarious in early September of 1953?

A. No. Neil was talking to me several times, and I always asked him "How is your mother?" It was always the same "About the same."

Q. When did you move into this 1010 Laurel Way, California?

A. I believe it was about the 4th of September.

Q. When you moved in, did you thereafter enter your daughter in any school?

A. Yes. I have told you that. She finally went to school.

Q. She went to school before you went to a hospital in September; isn't that so?

A. I don't remember whether she went before or during. I went to the hospital late in September, and she was in school late in September. I don't know the days.

Mr. Rosenblatt: May I have the original complaint verified in the original action?

Q. By the first of October, 1952, had your daughter been entered in school?

A. By the first of October?

Q. Yes.

A. I can't recall. I suppose there are school records. I don't remember.

Q. There are school records?

A. I am not sure. I think she was in school.

[fol. 281] Q. Tell us, when did you first see counsel with respect to your difficulties with Mr. Vanderbilt?

A. Late in September, sometime, I saw a lawyer.

Q. Who did you see?

A. I saw Mr. Jerry Rosenthal.

Q. Was Mr. Rosenthal a lawyer that you consulted on any previous occasion with respect to any legal matters?

A. No.

Q. You were then in litigation in an action in the Municipal Court in California, were you not, in September of 1952?

A. I wasn't in Court; no.

Q. Nobody had sued you before September, 1952?

Mr. Winsten: That is objected to, if your Honor pleases.

The Court: How is that material?

Mr. Rosenblatt: It will be very relevant in just a minute.

The Court: Sued her in a matrimonial action?

Mr. Rosenblatt: No; sued her for certain monies.

The Court: Go ahead.

Mr. Rosenblatt: She was represented by certain counsel.

Q. Am I right that you had been sued before September, 1952?

A. Yes. But, you asked me if I was in Court, and I wasn't in Court in September.

Q. I didn't ask you whether you were in Court. I asked you if you had been sued in the Municipal Court.

COLLOQUY BETWEEN COURT AND COUNSEL.

Mr. Winsten: I object to any reference to any action in the Municipal Court on the ground that it has no relevancy or materiality.

[fol. 282] The Court: I don't see the relevancy.

Mr. Rosenblatt: It will be very relevant and very material here on the claims of domicile, your Honor; I can guarantee that.

The Court: Domicile of this woman?

Mr. Rosenblatt: Yes; and, also, on the question of credibility, too.

The Court: Are you raising the issue of domicile in this case?

Mr. Rosenblatt: Because of your Honor's ruling which permits this case to go on in all this fashion, I don't know what I am trying at the moment; but I am certainly going to try domicile as part of it.

The Court: Did you raise it in your defense here, that she is not a resident of this State?

Mr. Rosenblatt: No, your Honor. But, she has raised it in an affidavit filed in this case, saying that the defendant's residence was a sham. That's all that has been submitted so far in this Court.

The Court: What has that got to do with her residence?

Mr. Rosenblatt: Since they were married, and her domicile allegedly followed her husband's, the question is very important as to not only what his domicile was, but her claims of domicile, as well.

Mr. Winsten: We have a question here of a claim by the defendant that he had a Nevada domicile.

Mr. Rosenblatt: And still has; that is right.

The Court: That has been established by him in that litigation over there. He said that that is his domicile. What [fol. 283] difference does it make where she lives?

Mr. Rosenblatt: Your Honor, you allowed questions yesterday that she had made an assertion repeatedly, time and again, that the parties were domiciled in New York. That is what she swore to in her complaint in the first action.

Mr. Winsten: We are not trying the first action.

Mr. Rosenblatt: I beg your pardon, sir.

The Court: As far as this case is concerned, all we are interested in is, number 1, the issues upon which the separation action is based; and, No. 2, the other issue as to whether or not he was domiciled in Nevada. Is that right?

Mr. Rosenblatt: No, sir. I think we are interested in more than that.

The Court: What is the next one?

Mr. Rosenblatt: We are interested in the burden assumed by the plaintiff.

The Court: In every issue there is a question of burden of proof, and who has the burden of proof. I am not talking about that part. I am talking about the issues before me. Based on the question of her domicile, she alleges in her complaint, and you haven't raised any defense about it, that she has resided for one year continuously prior to the institution of this action in the State of New York, which enables her, under the Statute, to bring this lawsuit. There is nothing else. We don't care what happened so far as anything else is concerned.

[fol. 284] Mr. Rosenblatt: May it please your Honor, there are two points involved here. Her assertion that she has lived here for one year prior to the institution of this action still involves a consideration of her domicile for one year prior to the time that the defendant secured his Nevada divorce.

Mr. Winsten: It does not, if your Honor please.

Mr. Rosenblatt: I beg your pardon.

Mr. Winsten: It concerns only the question of whether she was a resident of the State of New York continuously for more than one year prior to the commencement of this action.

The Court: The question of domicile is concerned only with whether she had a right to bring this action. You haven't raised it as a defense.

Mr. Rosenblatt: The burden is on her to disprove the validity of the Nevada decree.

The Court: What has that to do with her residence?

Mr. Rosenblatt: I don't know. Your Honor is trying everything: residence, the right to the action.

The Court: I am not trying her residence, because there is no defense to it insofar as that is concerned.

Mr. Rosenblatt: I say that the burden is upon this plaintiff, and I have the right to interrogate her with respect to all matters in connection with her domicile during the period in question.

The Court: What period are you talking about?

[fol. 285] Mr. Rosenblatt: All the period of the matrimonial life.

The Court: You can ask her where she lived in September. You can ask her, in connection with all of the testimony she gave, where she lived during the time that she testified to. If she was here in New York after he obtained a divorce, as you claim, in Nevada, and she establishes, as she claims, the required residence to bring this litigation, and there is no defense that she has not—I mean, there is no need for any testimony in order to establish that she was not a resident or domiciled here for one year prior to the institution of this action.

Mr. Rosenblatt: Part of the legal point I make is that she had no rights under the laws of New York at any time prior to the rendition of the Nevada decree, June 30th, 1953, not having been domiciled here for at least one year prior to that date.

The Court: That has already been established, when she started her first action, and the proof indicated that she was not domiciled here for one year, which enabled her to bring the lawsuit, and that action was dismissed on that ground; is that correct?

Mr. Rosenblatt: That is correct.

The Court: Therefore, she continued her residence until such time as she alleges that she resided here for one year, or more, prior to the institution of this action, and she brought the action. You have raised no defense that she has not met the requirement of the law. Therefore, there is no question here on her domicile or residence one year prior to the commencement of this action.

[fol. 286] Mr. Rosenblatt: I can't make the motion until the plaintiff's case is in, because I must establish, in my theory, that she was not a domiciliary of New York for one year prior to the rendition of the Nevada decree.

Mr. Winsten: Counsel made such a motion in the first

action before he even put in an answer. Now, he says he can't make that motion until the plaintiff's case is completed. That I don't understand.

Mr. Rosenblatt: That is why——

Mr. Winsten: If there is a question of jurisdiction, it is raised by motion and special appearance. The question of jurisdiction is raised in that way.

Mr. Rosenblatt: Pardon me. There is a special appearance here. It has been preserved by order of Justice McNally.

I said to your Honor yesterday I take the law laid down by Mr. Justice McNally as the law of this case, and I state in all humility that we wouldn't be in this position had I been afforded the opportunity to litigate, first, the question of domicile.

The Court: Whose domicile?

Mr. Rosenblatt: The defendant as well as the plaintiff.

The Court: That is not the issue before me, not her domicile.

Mr. Rosenblatt: The question is as to whether or not she was domiciled here for one year prior to the rendition of the Nevada decree, plus the question of whether he was lawfully domiciled in the State of Nevada at the time of the rendition of the decree in his favor.

[fol. 287] The Court: On the second one we are all agreed. On the first one, you say the question here is whether she was domiciled here for one year prior to the rendition of the Nevada decree.

Mr. Rosenblatt: That is right.

The Court: Why do you make that point?

Mr. Rosenblatt: Because if she wasn't she had no rights whatsoever under the laws of the State of New York in the Courts of New York.

The Court: That is the point you raised in the brief you submitted specifically on that point.

Mr. Rosenblatt: That is right, your Honor. That is correct.

The Court: I don't think there is any question about that. I don't think there is any question about that.

Mr. Winsten: I don't question that we have——

The Court: She had not been in this State one year be-

fore the rendition of the Nevada decree. Is that your point?

Mr. Winsten: We have an adjudication here——

The Court: We have an adjudication that she had not been at that time—at the time she started her first action, she had not been a resident for one year prior to the institution——

Mr. Winsten: That is right. There is such an adjudication.

The Court: Therefore, there is a rendition on that question? Why go over it again?

Mr. Rosenblatt: Your Honor refused to take it. You [fol. 288] said you had to wait for my time.

The Court: You offer it. Offer it at this time. If there is a decision by this Court on that point, I must take judicial notice of it.

Mr. Rosenblatt: I think that is correct, your Honor.

The Court: All right.

Mr. Rosenblatt: There is such a decision.

The Court: All right. So, we don't have to worry about that question.

Mr. Rosenblatt: One of the questions here before your Honor—and I would like to have it appear on the record—is: since your Honor has bunched together 1165-A and the consideration of 1170-B, the question is: what is the meaning of that part of 1170-B which says that when this action is dismissed because of the validity of the foreign ex parte decree, the court may give maintenance as justice requires.

Now, the question is this: if as in the Estin case, New York had made a decree saying this woman is entitled to so much for her separate maintenance, or in the Essenwein case—that is all right. The Supreme Court upholds the right of New York to say that its decrees can't be wiped out by the ex parte action of another State.

But, in this case, there was no prior determination by anybody. This poor lady was just in the wrong forum; and unfortunately for her, there was no determination by any court as to her right of support and maintenance prior to the rendition of the Nevada decree.

[fol. 289] The Court: I appreciate your point.

Mr. Rosenblatt: So, then, the question is this: what is

maintenance for an ex-wife who wins a case, and what is maintenance for a woman who is no longer a wife, in any sense of the word? The question is, therefore, what does justice require with respect to maintenance.

I say this, your Honor, and here is a very important consideration on the question of my future interrogation of this very witness. I say this, sir, if you, your Honor, had granted an ex parte decree to Mr. X, in the State of New York, for divorce because his wife was off some place else in New Jersey, or elsewhere, and it was an ex parte decree in the State of New York, and thereafter, this wife, instead of asking to open a default, asking to set aside the determination for whatever the grounds may be, brought an action herself for separate maintenance, separation, and then somebody, Mr. X, interposed your Honor's decree of divorce, and these people are all New York people, would your Honor thereafter, after dismissing this woman's case, find that she was entitled to anything? It is inconceivable. It couldn't happen in New York under any circumstances.

Mr. Winsten: Can I be heard for a moment?

The Court: First of all, I think all of this argument is premature. The only question that I have before me is whether or not I am to permit the evidence that you are [fol. 290] are attempting to elicit from this witness—was she sued here in some kind of a Municipal Court action?

Mr. Rosenblatt: No; in California.

The Court: In California, for the purposes of establishing or not establishing domicile. I said it is not relevant here because that is not an issue before me.

Mr. Rosenblatt: I told you, also, it would come in on the question of credibility.

The Court: All right, on the question of credibility.

We will adjourn here. We will come back at five after two.

Let me ask you this question, Mr. Rosenblatt. How much longer do you think you will go with this witness?

Mr. Rosenblatt: I am pretty sure I will be through this afternoon with this witness.

The Court: The whole afternoon?

Mr. Rosenblatt: I am pretty sure.

The Court: How many more witnesses have you, counsel?

Mr. Winsten: I don't have any more witnesses except possibly the proof of my services in this action.

The Court: How long will you be with this witness?

Mr. Winsten: Very briefly.

The Court: How many other witnesses have you?

Mr. Rosenblatt: If I go on with the defendant's case, I will have one, possibly two.

The Court: Long or short?

Mr. Rosenblatt: Short.

Mr. Winsten: In that connection, I would like to know how [fol. 291] your Honor would want me to submit proof about my services, in a general way, because that is a question your Honor is going to have to consider in this case, the question of counsel fee having been reserved for the trial court. How would your Honor want me to submit that?

The Court: Maybe you can get together.

Mr. Rosenblatt: The trouble with that is this, your Honor: when the original application was made for counsel fees, the Court gave him a certain amount of money, payable half at that time and half ten days before this trial, which was to encompass the trial.

Your Honor gave him an award for an appeal, arguing an appeal which he took from the denial——

Mr. Winsten: For arguing a denial and defending a cross-appeal.

Mr. Rosenblatt: That is right.

The Court: Did I have that motion?

Mr. Winsten: You had that motion.

Mr. Rosenblatt: Now, the question is what is additional beyond the amount that has already been paid out pursuant to the direction of the Court; and I insist on some kind of proof on that.

Mr. Winsten: My quarrel with Judge Rabin's order was, he said counsel fee is being granted only for the purpose of defending against the foreign decree being asserted here by the defense under any section of the Civil Practice Act which provides——

The Court: In the first instance, you were not entitled

to counsel fees because she was out of court. We had no [fol. 292] jurisdiction.

Mr. Winsten: That was the first case.

The Court: That is all out. I can't pay——

Mr. Winsten: I am not seeking anything for that action.

The Court: You started this action after you established your residence.

Mr. Winsten: I made a motion——

The Court: Did you make an application for counsel fee at that time?

Mr. Winsten: Yes, I did. The sum of $2,500 was awarded, reserving the balance for consideration by the Court.

The Court: You received $2,500 already?

Mr. Winsten: That is right.

The Court: You will have to offer testimony or evidence where you say you are entitled to further counsel fees in addition to $2,500. On the appeal work you were paid.

Mr. Winsten: That is right. The appeal is not involved.

Mr. Rosenblatt: Judge Rabin gave the counsel fee, but for defending against my defense. Your Honor has permitted the suit to go on, and the burden of sustaining the question of the validity, or the claimed invalidity is on him, and I haven't heard any part of it yet.

Mr. Winsten: We are still proving our complaint, Mr. Rosenblatt.

The Court: Five minutes after two.

(Whereupon, a recess was taken for luncheon until 2:05 P. M.)

[fol. 293] Afternoon Session

2:05 o'clock P. M.

PATRICIA W. VANDERBILT, resumed:

Cross-examination.

By Mr. Rosenblatt (continued):

Q. Mrs. Vanderbilt, were you present at any place or time when Mr. Vanderbilt made a report about what happened in a cabin on the S. S. America between you and him?

A. Was I present when he made a report? No.

Q. Did you know what report he made?

A. I knew much later that he had talked to people about it.

Q. Did Mr. Vanderbilt tell people that you had fallen?

A. I heard later that he had.

Q. And did you make any attempt to contradict him?

A. Yes.

Q. You did.

Mr. Rosenblatt: Now, may it please the Court, on the basis of the witness' answer, I read to your Honor from an affidavit filed in this court, duly verified by Patricia W. Vanderbilt, on the 19th day of June, 1954, page 5 thereof, the following:

"In giving a report of the incident to the surgeon the defendant stated that I fell. However, I made no attempt to contradict the defendant in that regard since I desired to avoid unpleasant publicity."

Q. Did you make that statement under oath in this Court in that affidavit that I have just read from?

A. Yes. I take it that is before the Court, yes.

[fol. 294] Q. Now, tell me, Mrs. Vanderbilt, in the latter part of September, 1952, when you saw, you say, Mr. Rosenthal——

A. Yes.

Q. The lawyer in Los Angeles, California?

A. Yes.

Q. And you consulted him about the matrimonial difficulties with your husband?

A. Yes.

Q. And had you previously had any conversation with any other attorney in the State of California about the matrimonial problems?

A. No.

Q. You were then being represented, were you not, in an action in the Municipal Court of the Los Angeles Judicial District, by the law firm of Butts & Grosenbaugh, is that so?

A. Mr. Butts was handling that case for me, yes.

Q. Was he your lawyer?

A. On that case.

Q. Did you discuss anything about your matrimonial problems with Mr. Butts?

A. Not in relation——

Mr. Winsten: That is objected to, if your Honor pleases.

Mr. Rosenblatt: On what grounds? She had a lawyer. I have a right to ask if she talked to him about it.

Mr. Winsten: That is a confidential relationship, if anything.

The Court: Objection sustained.

Mr. Rosenblatt: Exception.

Q. Now, you caused the summons in the previous action brought by you against Mr. Vanderbilt in this court to be issued by counsel in New York, did you not?

A. Yes.

Q. And that summons was dated October 1st, 1952, isn't that so?

A. I don't know.

Q. Didn't you commence that action by serving Mr. Van- [fol. 295] derbilt on the 1st day of October, 1952?

A. I don't remember the date.

Q. Well, would it refresh your recollection if I showed you the affidavit; sworn to and filed in this very court as of the 19th day of June, 1953, wherein you say—I am showing you now your signature.

A. Yes.

Q. And I am showing you the sentence which says: "This is an action for a separation which was commenced by the personal service of a summons on the defendant at 1048 Fifth Avenue, New York City, on October 1st, 1952."

A. Yes.

Q. Is that right?

A. That's right.

Q. So that it was commenced on that day?

A. Yes.

Q. Now, where were you on October 1st, 1952?

A. I was in the hospital in California.

Q. And thereafter you verified the complaint in that case, did you not?

A. In the hospital in California.

Mr. Winsten: May the record show that counsel is referring to the prior separation action which had been disposed of?

Mr. Rosenblatt: Now, may it please the Court, this plaintiff swore in pleadings, in verifications, and the complaint in the previous action on the 10th day of November, 1952, before a notary public in the State of California, County of Los Angeles, in paragraph 1 thereof, that both of the parties to this action, meaning the plaintiff and the defendant, have continuously resided as husband and wife within the State of New York for at least one year prior to the commencement of this action, and at the present time—that is the date of the verification, the 10th day of [fol. 296] November, 1952—and at the present time both are residents of the State of New York.

I desire the record to show that the verification made by this plaintiff, Patricia W. Vanderbilt, who is now on the witness stand, recites that on the 10th day of November, 1952, "I am the plaintiff in this action. I have read the verified complaint and know the contents thereof to be true to my own knowledge, except as to those matters therein alleged to be on information and belief, and as to those matters I believe them to be true," and I direct your Honor's attention to the fact that in that complaint that allegation which I read is not upon information and belief.

Q. Now, Mrs. Vanderbilt, at or about the 10th day of November, 1952, the day you verified the complaint in this

suit against your husband which was previously in this court, you were defending a suit in the Municipal Court of Los Angeles District, County of Los Angeles, State of California, where the question of residence was at issue, isn't that so?

A. The question of residence in California was in issue? No.

Q. That's right.

A. No, no, no, no.

Q. No, no, no; is that your answer?

A. That's my answer.

Mr. Rosenblatt: Now, may it please the Court, I offer in evidence a duly exemplified photostatic copy of a complaint in the Municipal Court, Los Angeles Judicial District, County of Los Angeles, State of California, Number 14272, brought by one Linda Schroeder, plaintiff, against Mrs. [fol. 297] Cornelius Vanderbilt, Jr., also known as Patricia Mercy Vanderbilt, also known as Patricia Wallace Vanderbilt, Doe 1, Doe 2 and Doe 3, defendants. As part of the same exhibit I offer in evidence a duly exemplified photostatic copy of the answer interposed by Patricia W. Vanderbilt. As part of the same exhibit I offer in evidence the amendment to the complaint in the same action, No. 14272, and the answer to the amendment to the complaint in the same action filed by Miss Vanderbilt, and bearing a reproduction photostatic of her verification of the said answer to the amendment to the complaint, both such papers being likewise duly exemplified.

And as part of the same exhibit the statement verified by Patricia W. Vanderbilt in the same action entitled "Notice of Defendant's Motion for Summary Judgment."

And also as part of the same exhibit duly exemplified from the files of the same court proceedings the affidavit of the plaintiff in resistance to a motion for a summary judgment.

And finally a duly exemplified stipulation for judgment dated June 19, 1953, in which it is stipulated that judgment may be entered in favor of the plaintiff and against the defendant Patricia W. Vanderbilt, also known as Mrs. Cornelius Vanderbilt, Jr. in the sum of $500—all as one exhibit.

Mr. Winsten: May it please the Court it will take a little time for us to examine this.

The Court: Suppose then we mark them later on. You will have a chance to examine them and you can go on to [fol. 298] something else. Is that all right, Mr. Rosenblatt?

Mr. Rosenblatt: Yes.

The Court: We can proceed in the meantime with other questions.

Mr. Winsten: What is the Court's disposition of this?

The Court: We are holding that in abeyance. You may examine that in the meantime and then it will be re-offered.

Q. Now, when you brought the action or caused the action to be brought in New York against Mr. Vanderbilt, did there finally come a report of a Referee appointed by the court? Do you recall that?

A. Yes.

Q. Referee Lazar.

A. Yes.

Mr. Rosenblatt: Now I ask your Honor to deem marked in evidence as a defendant's exhibit the report of the Hon. Harold S. Lazar, dated January 13, 1953, and on file in this court.

Mr. Winsten: I would like to have my objection noted to this, if your Honor please, on the ground that it is incompetent, irrelevant and immaterial to the issues in this action.

The Court: Objection overruled.

Mr. Winsten: Exception.

(Received in evidence and deemed marked Defendant's Exhibit F.)

Mr. Rosenblatt: And may I ask your Honor at this time to deem marked in evidence as a defendant's exhibit the order of Mr. Justice Greenberg of this court [fol. 299] made on the 27th day of February 1953.

The Court: You mean dismissing the action?

Mr. Rosenblatt: Confirming the Referee's report and dismissing the action.

Mr. Winsten: Same objection.

The Court: Same ruling.

(Received in evidence and deemed marked Defendant's Exhibit G.)

Q. Now on or about the 27th day of February 1953 were you residing at the Barbizon Hotel for Women?

A. Yes.

Q. And when did you move to the Hotel Algonquin?

A. I am not sure of the date; sometime, I think sometime in April.

Q. And when you went to the Algonquin did you live on a credit card?

A. Yes.

Q. And that credit card affected the credit of whom?

A. I don't know what you mean.

Q. Was it your personal credit that you were living on or was it Mr. Vanderbilt's?

A. I just charged it. I had a credit card.

Q. You had a credit card to charge to Mr. Vanderbilt?

A. Yes.

Q. And tell his Honor what you were paying a day at the Algonquin Hotel?

A. I cannot recall what it was definitely, I don't know. It was about $15 a day, or something, plus food.

Q. And how much had you been paying at the Barbizon for Women?

A. About $8, $9, $10 a day, plus food.

Q. And when you left the Algonquin you say you went to live with a Mrs. O'Donnell?

A. I said I stayed with Mrs. O'Donnell for a week, or something like that, or two, and then I went to [fol. 300] the hospital.

Q. Well, when did you stay with Mrs. O'Donnell, please?

A. I think sometime in June, late June.

Q. And is it a fair statement that early in June you were living at the Algonquin Hotel?

A. I cannot recall the dates or anything there.

Q. Do you recall when you were served with the summons and complaint in an action brought by Mr. Vanderbilt for divorce in Nevada?

A. Do I recall what?

Q. The date.

A. No.

Q. I show you an affidavit filed in this court under Index No. 31632—1952, verified by you on the 19th day of June, 1953, and ask whether you signed this affidavit containing the paragraph immediately preceding your signature?

A. This is my signature, yes.

Q. And you had read it before you signed it?

A. Yes, I think so.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Rosenblatt: Now may it please the Court, I desire to read from this affidavit the following paragraph which is the last paragraph immediately prior to the plaintiff's signature.

"On June 9th, 1953, I was handed a summons and complaint issued out of the Second Judicial District Court of Washoe County, Nevada, bearing Docket No. 146128—1953, in which defendant prays for a decree of absolute divorce. I cannot appear and defend in that action, and while I do not take any position concerning its validity, I know that if defendant is permitted to continue that action he will have seriously prejudiced my rights in that he will have obtained a colorable divorce. I ask that this Court direct [fol. 301] the defendant from taking any further proceedings in that action until this Court shall otherwise direct, so that if my appeal is successful, as I believe it will be, I will not be hampered upon the trial by defendant's assertion that we are not married."

In connection therewith, may it please the Court, I ask to have deemed marked in evidence as defendant's exhibit the order of Mr. Justice Rabin of this Court filed on July 3, 1953.

Mr. Winsten: If your Honor please, I object to the reception of the order and the part of the affidavit that was read into the record by counsel at this time on the ground it is absolutely incompetent, irrelevant and immaterial to this action, except in so far as possibly it goes to establish the fact that possibly service was effected upon the plaintiff in this action of the Nevada summons and complainf.

The Court: What about that part of the affidavit that

you offered in evidence, Mr. Rosenblatt? What is the purpose of that?

Mr. Rosenblatt: I claim among other things the legal point of estoppel here, that this plaintiff is estopped by the action of this Court who entertained her motion to restrain and enjoin that proceeding in Nevada, and thereupon this Court refused, and I claim that that constituted an estoppel in this very court on the question of whether or not he had a right to obtain and secure the decree in Nevada. You may, by the way, take and properly take judicial [fol. 302] notice of the Laws of Nevada, which provides for a direction that a plaintiff's husband in an action out there may be required to pay his wife's expenses of coming to Nevada, if she applies for the same and for an award of counsel fees to defend the action after she gets there, and prosecutes one on her own behalf if she so desires.

The Court: Suppose it does? You don't think that where these wives have certain rights that they feel they may have in other States, they may lose them by submitting themselves to the jurisdiction because this law in Nevada provides that the husband upon proper application will pay the proper expenses of the wife providing they make an appearance in the lawsuit, and if they do not follow this provision that they will be estopped from asserting any of their rights in any other State, do you?

Mr. Rosenblatt: I am saying that when Mr. Justice Rabin denied her application to restrain and enjoin the proceeding for this foreign divorce, that that was an estoppel in this case, your Honor, that is binding on this Court. Incidentally, this was urged also on the basis of estoppel in the Appellate Division thereafter.

Mr. Winsten: If your Honor pleases, first of all it must be of recent enactment of something that I don't know of that this Court will take judicial notice of the laws of a foreign State.

The Court: I think I answered that before.

Mr. Winsten: Number two: When this motion to dismiss made by the defendant in this action was heard before [fol. 303] Mr. Justice McNally, and that motion was denied upon argument in open court, when Mr. Rosenblatt started to relate to this Court all about the first action and estoppel and res adjudicata and everything else, Mr.

Justice McNally asked counsel the direct question. He said to him, "Mr. Rosenblatt; do you claim that the first action is res adjudicata on any issue in this case?" and Mr. Rosenblatt's reply to that was, "I do not."

But Mr. Rosenblatt happens to change his position every time he is before a different Judge. I have so stated in my affidavit which he did not deny in one of the motions in this case, that he made that statement in open court, and he admitted to Mr. Justice McNally that he was not making any claim of res adjudicata of the prior action, and it cannot be properly made for this reason, if your Honor pleases.

That action was dismissed on the basis of lack of jurisdiction. If this Court had no jurisdiction to entertain the action—the first action I am referring to—and this so held—it has no jurisdiction to entertain or rule on the merits of any subsequent application made in this case including an application for an injunction made subsequently in June 1953.

The dismissal or denial of the motion for an injunction can give no comfort to the defendant with respect to estoppel, res adjudicata or anything else, because on February 27th, Judge Rabin made an order that this Court had no jurisdiction to entertain the action

[fol. 304] The Court: However, he has raised the point. I have listened to it, and I will take it into consideration.

Mr. Rosenblatt: May that order be deemed marked as an exhibit?

The Court: Yes.

Mr. Winsten: Exception.

(Received in evidence and deemed marked Defendant's Exhibit H.)

The Court: Mr. Rosenblatt, you know the fact that the Court does not deem it expeditious or for some other reason to estop a husband or a wife from prosecuting an action in some other jurisdiction does not in and of itself estop her from bringing or asserting any rights that the party may have here under the proper statute; and under 1170, under which this action is brought, it specifically says that even where a husband has sought and secured an ex

parte divorce decree in another State—and we must give full faith and credit to it providing everything else is met that satisfies us—that a party can still bring an action here, as I think you have indicated in your argument.

Mr. Rosenblatt: That's right, that's what it seems to be.

The Court: And if the law so states, how can they be estopped? If that is so, then the statute would read and provide in the event the husband has brought an action and this Court does not find any sufficient grounds to stop or enjoin the prosecution of that lawsuit—that automatically stops every wife from bringing an action under 1170. [fol. 305] Mr. Rosenblatt: I understand, and you will get the differentiations in my reasoning in connection with the estoppel point as I indicate to Judge McNally, and the position that we take here in this connection which is entirely different.

Here we are on trial where the plaintiff has the burden of proving the invalidity of the Nevada decree.

I think, your Honor, that this is just as good a time as any to ask that you deem marked in evidence, and I offer the same as a defendant's exhibit, the opinion of Mr. Justice McNally in this case, and the opinion which he made on June 16th, 1954, duly filed in the office of the Clerk.

The Court: How is that binding on me? The Judge rendered his opinion based on affidavits. I have to render my opinion based on the testimony, testimony that may have been included or may not have been included in those affidavits, or may have been developed along different lines.

So I cannot follow—I mean, with all due respect to Judge McNally's decision at the time, I don't quarrel with his decision, but I say the fact that he made that decision based on affidavits, cannot bind me, and I cannot take judicial notice and it would be of no force in this case in determining the issues that we are trying.

Mr. Rosenblatt: Does your Honor object?

The Court: I say it has no materiality. It is not binding on me. What am I going to do with it after I mark it in evidence? I cannot follow it, I may agree with it at [fol. 306] the end of this case, with some of it, but I cannot follow it, because that is his decision. I can only follow the testimony here and come to my own decision on the issues before me. He had a different situation before him.

Mr. Rosenblatt: If your Honor rules that it is not properly offered, then at least I have my exception and I can have it printed in the record in the future; whereas, if I don't offer it as an exhibit, I don't know how to get it before any other court as part and parcel of the record of this case.

The Court: I will let you mark it in evidence if it is material in this lawsuit.

Mr. Rosenblatt: I submit that every order made in this case is material.

The Court: If it is material.

Mr. Rosenblatt: I think so.

The Court: But Judge McNally's decision could not in any way affect the result in this case.

Mr. Rosenblatt: Very well, your Honor. You are certainly entitled to that.

The Court: You may have an exception.

Mr. Rosenblatt: That's all right, sir.

Now, do you think we can get a reply on these papers which I asked to be marked before?

The Court: Have you looked at them, counsellor?

Mr. Winsten: No, I have not been able to conclude it, your Honor.

Mr. Rosenblatt: In view of the portion read into the record with respect to the service of process in Action No. 146128 in the Judicial District of the State of Nevada in [fol. 307] and for the County of Washoe, I offer an exemplified copy of all the proceedings therein filed.

Mr. Winsten: May I see it, please?

Mr. Rosenblatt: I am now in effect actually re-offering the Defendant's Exhibit A in the preliminary motion which was marked Defendant's Exhibit A for all purposes in this action.

Mr. Winsten: With respect to the offer of this so-called exemplified copy, I have two objections to make, if your Honor please.

First of all, it appears to be exemplified only as to the complaint.

Number 2: If properly authenticated and exemplified, it is only admissible as to the decree itself and not with respect to any testimony taken ex parte or any findings of fact and conclusions of law, because as your Honor very

well knows, this decree, if valid, and based upon a proper domicile of the defendant in this action in Nevada, can only be given full faith and credit by this Court under the Federal Constitution with respect to its effect upon the marital status of the parties only, and not with respect to any findings of fact or evidence or testimony taken in that one-sided ex parte proceeding, and on those grounds I object to the offer, if your Honor please.

The Court: Off the record, let me say this:

(Colloquy between the Court and counsel off the record.)

Mr. Rosenblatt: May the record show that I have an exception, if the Court please, to your Honor's sustaining [fol. 308] the objection to my offer of what amounts to really its judgment roll.

The Court: Here is what I am going to do. I am going to accept this, but it makes no difference to the issues in this case, anything you have in there so far as testimony is concerned as being any evidence in determining the issues here.

Mr. Rosenblatt: I have not asked you to do that, your Honor. This is just for the purpose of showing the regularity of the proceeding there and the fact that it was duly taken.

The Court: If it is properly authenticated and exemplified, I will take it, but it really does not make any difference. He does not question it either—or do you?

Mr. Winsten: I don't question the judgment, your Honor.

The Court: He does not question it.

Mr. Winsten: I question merely the offering of testimony and the findings here.

The Court: He is not offering it for the purpose.

Mr. Winsten: But it should not be any part of this record, I submit, if your Honor please.

The Court: He has got to submit the decree.

Mr. Winsten: The decree, yes.

The Court: So he is submitting everything that goes with it, but again I say, not that it means anything.

Mr. Winsten: If your Honor please, there is a copy of the decree that is in the file papers right here and now [fol. 309] that I am willing to go along with, but there is

no necessity for offering all this. On the question of exemplification——

The Court: If it is authenticated, put that in.

Mr. Winsten: There is no necessity, your Honor, for offering this whole judgment roll.

(Colloquy between the Court and counsel, off the record.)

Mr. Rosenblatt: Then, may it please the Court, may we ask that the exemplified copy of the decree of divorce, duly exemplified on the 30th day of June, 1953, filed in this court as part of the papers before Mr. Justice McNally when he made his determination on June 16th, 1954, be deemed a defendant's exhibit at this time?

The Court: Yes.

(Exemplified copy of decree received in evidence and deemed marked Defendant's Exhibit I.)

Q. Now, Mrs. Vanderbilt——

Mr. Rosenblatt: By the way, I would like to ask if you have finished with these other papers.

Mr. Winsten: Yes. I object to the introduction of all of them, if your Honor please, and I should like to direct your Honor's attention to certain statements made in this amendment to the complaint which are extremely prejudicial to the plaintiff and have no relevancy or materiality [fol. 310] to this case.

The Court: I have not seen the papers so I don't know what you are talking about. All right, now, what is it?

Mr. Rosenblatt: I would like to have them gone through one by one, your Honor, and I offer them as part of one exhibit.

Mr. Winsten: Well, particularly I am addressing myself to the complaint, and I will point out to your Honor what I have reference to.

The Court: As to the complaint, Mr. Rosenblatt, you are offering this complaint in evidence for what purpose?

Mr. Rosenblatt: For two purposes: one, to impeach her statement under oath as filed in this Court with respect to her husband.

The Court: A complaint served on her?

Mr. Rosenblatt: And her answer. I made all of them

part of the same exhibit. I have got a right to show admissions made between a complaint and an answer filed by a defendant.

The Court: Let me see the answer.

Mr. Rosenblatt: That's right.

The Court: I have it here.

Mr. Rosenblatt: And here is the first answer.

(Conference between the Court and counsel at the bench.)

The Court: Answering paragraph 2 of the complaint, it says here, which is the residence allegation, this defendant denies generally and specifically each and every allega-
[fol. 311] tion contained therein, and further denies that she is indebted to the plaintiff in the sum of $2,000, and so on and so forth. She denies it.

Mr. Rosenblatt: That's right.

The Court: She denies that she lived in California.

Mr. Rosenblatt: That's right.

Mr. Winsten: That is not inconsistent, your Honor.

Mr. Rosenblatt: Let us go on.

The Court: What is the date of the Complaint?

Mr. Rosenblatt: Dated—it was filed March 6th, 1952, and the answer was filed March 20th, 1952. Now we get to the amendment to the complaint, which is March 27th, 1952, the amendment to the complaint.

The Court: Where is there anything about residence?

Mr. Rosenblatt: It incorporates, the answer to the amendment incorporates the defenses and denials again.

(Conference between the Court and counsel at the bench.)

The Court: All you will have marked in evidence is paragraph 2 of the complaint, and paragraph 1 of the answer, for the purposes solely, as you claim, of indicating that she did not deny the allegation of residence in California at that particular time.

Mr. Winsten: Exception.

Mr. Rosenblatt: Now, may it please the Court, I want all these papers marked. You are only giving me part of one and two, and I want the motion for judgment made by
[fol. 312] this plaintiff, motion for summary judgment, which has statements with respect to residence.

Mr. Winsten: By the plaintiff?

Mr. Rosenblatt: By this plaintiff, Mrs. Vanderbilt, here.

The Court: That part which you say is relevant here, is that portion of page 3 on the bottom thereof beginning with the line 27, meaning that the plaintiff herein has been physically present within the State of California for ten years since May 22nd, 1940.

Mr. Rosenblatt: That's right.

The Court: Meaning up to 1950, May 22nd?

Mr. Rosenblatt: That's right.

The Court: I will accept just that part of the affidavit. Is there any question about the fact that she made the affidavit?

Mr. Winsten: No.

The Court: Then I will accept it.

Mr. Rosenblatt: What about the stipulation for judgment, your Honor?

The Court: How is that relevant?

Mr. Rosenblatt: That after having made these denials it stipulates for judgment. I do not draw any inferences except that she consents to judgment.

The Court: You are only interested in residence. If she got a judgment or did not get a judgment, is not material.

Mr. Rosenblatt: Now I will offer all these papers on the question of the credibility of this lady as a witness generally, Mrs. Vanderbilt.

[fol. 313] Mr. Winsten: That is objected to if your Honor please.

The Court: Objection sustained.

Mr. Rosenblatt: And I ask that they all be marked, since I offer them as one exhibit.

Mr. Winsten: For what?

Mr. Rosenblatt: They are going to be marked for identification now. The Judge has kept them out.

Mr. Winsten: You did not say so.

(Seven papers marked Defendant's Exhibit J for identification.)

Q. When you moved to live with Mrs. O'Donnell—what is Mrs. O'Donnell's full name?

A. Mrs. O'Donnell, Dolores O'Donnell.

Q. Is she a widow?

A. No, no.

Q. What is her legal name? Is she separated from her husband?

A. No.

Q. What is her name?

A. Dolores O'Donnell.

Q. Where does she live?

A. At the Ansonia Hotel.

Q. Did you say that she was a friend of yours for some 15 years?

A. I actually met her for the first time in 1939 or 1940.

Q. In California?

A. Yes.

Q. And you said that from November 1952 until December 1953 you received no moneys from Mr. Vanderbilt, is that right?

A. From what?

Q. What's that?

A. What are you saying?

Q. I am reading from page 151. The period I have indicated was November, 1952, until December 1953. This is asked by your counsel. "A. No, not during that period."

A. Yes.

Q. Is that correct?

A. Yes.

Q. In other words, you did not receive anything from [fol. 314] him from November 1952 to December 1953?

A. That's right.

Q. Didn't you make any application in the spring of 1953 to the Domestic Relations Court?

A. Did I make an application? Yes.

Q. And didn't you get some money after you withdrew that application?

A. No.

Q. Didn't you get at least two payments of $300 a month?

A. No.

Q. Did your lawyer receive them?

A. I don't know what my lawyer does about that. I never got the money.

Mr. Winsten: Let the record indicate that I did not represent the plaintiff at that time, so any reference to a lawyer was not to me.

Mr. Rosenblatt: And that is why I want to ask you now to concede that sums of money were given to her previous lawyer, Andrew Weinberger, paid supposedly for her and the sums of money came through my office.

Mr. Winsten: I cannot concede that because it is not within my knowledge. This is the first I ever heard of it.

The Court: All right, he does not know anything about it.

Q. And you don't know anything about it?

A. I did not receive any money.

Q. Did your know that money went to Mr. Weinberger?

A. No.

Q. You never heard of it before?

A. Are you saying you gave me money?

Q. I am saying that I provided funds to Mr. Weinberger.

A. No.

[fol. 315] Q. You don't know anything about that?

A. No.

Q. Well, Mrs. Vanderbilt, you signed an affidavit in this court on the 24th day of June 1953, didn't you?

A. Yes, that is my signature.

Mr. Rosenblatt: May I read into the record the statement:

"The only moneys"—appearing at page 4 of that paper—"The only moneys I have received from my husband since October 1, 1952, were through his lawyers and mine, and consist of $750 on about November, 1952, and $300 on or about April 15, 1953."

The Witness: I don't recall that that money was used. You wrote all sorts of things on the check, didn't you?

Q. You said here that you had received those moneys from your husband. I did not make this affidavit. Was it true?

A. I say that the money was never used because the check was full of all sorts of cond-tions to me.

Q. Did you receive it?

A. I did not receive it, no.

Q. So that this affidavit was incorrect?

A. It must have been in the lawyer's hands.

Q. But the affidavit is not true insofar as the $300 on April 15th, 1953, is concerned?

A. Does the affidavit say that I used the money at that time?

Q. I don't know what the affidavit says.

Mr. Winsten: Can I see the affidavit that counsel is referring to?

Mr. Rosenblatt: Sure.

Mr. Winsten: Maybe there is an explanation of this situation.

[fol. 316] Mr. Rosenblatt: I am looking for it myself. I now want to read further from the same affidavit. It says, "The payment"—that is, the $300—"on about April 15, 1953, was made and accepted."

Q. Is that true?

A. I cannot recall all of that.

Mr. Winsten: Will you read the whole statement?

Mr. Rosenblatt: I don't have to read the whole statement since it does not controvert this statement.

The Court: Did you receive $300 in April 1953, yes or no?

The Witness: I don't recall.

The Court: She does not remember.

Q. You testified yesterday you had received some money in October 1952 from Mrs. Van Name, Mrs. Vanderbilt's fiscal secretary.

A. No, no. October 1952 I did not receive anything from her.

Q. When you went to the——

The Court: Here is her testimony. She says in December 1953 she got checks for $300, and then she received $300 a month until 1954, April, and then the money stopped when this case was started.

Mr. Rosenblatt: Now we are back in October 1952, your Honor.

The Court: All right, go ahead.

Mr. Rosenblatt: But she did say she received no moneys from November 1952 to December 1953.

The Court: She says in October 1952 she got a check for $600 and $750.

[fol. 317] The Witness: But that was from my husband, and the other one was from Mr. Sinai. That is not from Mrs. Van Name.

Q. Did you receive any check for $600 from Mr. Vanderbilt in October?

A. Yes, after the start of that first business there.

Q. Now you recall your testimony about your injuries since 1951 and before 1951?

A. Yes.

Q. Now, the times as I understand it you were in the hospital were for two days in 1949 and thereafter in a ship's hospital in August 1951, is that right, up to that voyage on the "America"?

A. I was in the hospital those two times, yes.

Q. And you say in your testimony that you lost muscle control, and on two occasions prior, "To my being put into the hospital twice I lost the use of my right arm from this nerve in the spine."

It is your testimony that twice before you went to any hospital, even in 1949, you lost the use of your right arm from a nerve in the spine?

A. Those two times are much, much later, those two hospital stays. There were two times, once in November 1952 in California, almost the whole month I was in the hospital in traction for this arm and neck.

Q. I am talking about before you went to a hospital in 1949.

A. You are indicating something contrary to what is true, and then——

Q. I am only reading your testimony, madam.

A. Well, I am clarifying it for you, if you don't understand it. You are trying to put these times before 1951, and they are since then.

Q. My dear lady, it says, "I lost muscle control and on two occasions prior to my being put in the hospital twice

I lost the use of my right arm from this nerve in the spine."

A. Yes.

[fol. 318] Q. And then, "I lost a great deal of weight after the boat in 1951."

A. Well, I am sorry. Would you like me to clarify it for you, because in 1952——

Mr. Winsten: Can I see from what counsel is reading?

Mr. Rosenblatt: Certainly.

A. (Continuing) Those two hospital stays, one in 1952 for about four weeks in November, and then in 1953, for about six weeks, and you are trying to put them before the boat occurrence.

Q. Madam, I am trying to find out, according to your testimony, when was the first time during your marriage to Mr. Vanderbilt that you were in the hospital and isn't it true that it was in August of 1949?

A. That's right, but that had absolutely nothing——

Q. And the next time you were in the hospital was in August of 1951?

A. In the ship's hospital.

Q. That's right. I did not create your testimony here.

The Court: Next question.

Mr. Winsten: I direct your Honor's attention to my question up here, and it calls for the years 1951 and 1952.

The Court: She has already cleared it up. Next question.

Q. Now, you said you had lived at a rate of over $100,000 a year, is that right?

A. Yes.

Q. In that amount from September 1948 to September 1952. Is that what you want the Court to understand?

A. Yes, that's the time when we were living together.

Q. When you say you were living at the rate of $100,000 a year, does that include all the expenses of yourself, your [fol. 319] husband, the upkeep of the house, the servants, the cars, the travelling expenses?

A. This is what the lawyers and the bills and the figuring came to.

The Court: That's what you computed with the help of all these bills?

The Witness: Yes. I am taking in all of these trips and all.

Mr. Rosenblatt: I now offer in evidence, may it please the Court, copies of Mr. Vanderbilt's tax returns for the years 1947—I withdraw that.

I offer in evidence the tax returns for the years 1949, 1950 and 1951, which are joint returns of both parties.

Mr. Winsten: That is objected to, if your Honor please, on the ground that the defendant is not here to be cross-examined with respect to these tax returns.

The Court: Are they joint returns?

Mr. Rosenblatt: They are joint returns. They were admitted in evidence before Referee Lazar.

Mr. Winsten: Whether these are in evidence before a Referee or not does not make them material here.

The Court: I am not admitting them in evidence because they were in evidence before Referee Lazar. I am admitting them in evidence, however, because they are joint returns.

Mr. Winsten: Exception, your Honor. It also appears that they have not been signed by anyone, if your Honor please.

Mr. Rosenblatt: I said that they are copies I cannot get the originals.

[fol. 320] Mr. Winsten: And I would like to make my position clear on the record. If the defendant were here to be cross-examined with respect to these returns I would withdraw my objection now; but I do not believe that I should be bound by statements made by an absentee defendant.

The Court: Did you file returns for 1949, 1950, and 1951, jointly with your husband?

The Witness: I filed some returns, but I don't know if these are those.

The Court: Show her the copies. The question is this: Is that your joint return with your husband?

The Witness: It is impossible to say, sir.

The Court: You cannot say whether it is or not?

The Witness: I want to see it, if it is recognizable to me.

You see, I understand that one can get copies right from the Internal Revenue, and I would like to know why that is not done here.

The Court: The question is, do you recognize whether that is your joint return. If you do, say yes. If you don't, just say so. Is it or is it not your return?

The Witness: It looks to me some peculiar things that I don't know about.

Mr. Rosenblatt: May it please the Court, under the Civil Practice Act these being the original exhibits offered and introduced and accepted in a proceeding between the same parties in this same court are admissible in evidence without anything more before your Honor.

Mr. Winsten: The defendant was present at the time these exhibits were offered, for one thing, if your Honor [fol. 321] please. Certainly they were identified on the testimony of the defendant who was there. He is not here now, and they were offered there for a different purpose, not to prove the truth of the contents of those exhibits, but to indicate where a residence was indicated on there.

The Witness: These were not shown to me.

The Court: Offered by the defendant, is that right?

Mr. Winsten: I believe it was offered by the defendant, yes, your Honor.

The Court: Did you ever see these before?

The Witness: No, they were not shown to me.

The Court: So that you cannot say whether they are or are not your tax returns with your husband?

The Witness: No. They are not signed.

Q. In 1949, for the year 1949, Mrs. Vanderbilt, was Mr. Vanderbilt supporting your daughter, Nanette Wallace?

A. In 1949?

Q. Yes?

A. Yes.

Q. In 1949 did you receive the sum of $3,000 from the J. Walter Thompson Company?

A. I don't remember whether I did. I have received about three sums from them. Whether it was in 1949, I cannot recall.

Q. You recall other events in 1949. Can't you cast your mind back and recall this one?

A. As to whether I did in 1949 or late 1948, I don't know.

Q. Did you get paid in 1949?

A. I don't recall.

Q. Do you know anything whatsoever about the World Literary Service?

A. Yes.

[fol. 322] Q. What was it?

A. A company of my husband's.

Q. And do you know whether your husband got any reimbursement of any kind of expenses from that company?

A. Well, he is the company.

Q. Do you know whether or not during the year 1949 your husband engaged in any business travel or business entertainment?

A. In 1949.

Q. Yes.

A. Yes.

Q. And do you know what the total of his business deductions were in that year?

A. No.

Q. Do you know the total of his income in that year?

A. I don't know the entire total, no.

Q. How much of it do you know?

A. I cannot keep figures, particularly in my head. I cannot place them, what it would be in total in 1949.

Q. Well, is that statement that you now make equally true about your use of the term of $100,000 a year?

A. Yes.

Q. You could keep that in your mind all right, can't you?

A. Well, these things have been added and figured out for me.

Q. In other words, you have a breakdown showing living at the rate of $100,000, by a breakdown which has been added up for you, is that right, yes or no, please?

A. Well, what I am trying to say is, that all of our travels approximately so much a day would be spent, and eating and all of these affairs, things, clothing and so forth and so on, that a great amount of money was spent.

Q. Did you make a record of that?

A. I don't have a record of it.

Q. Did you have a record made for this very trial to show the expenditure on a living scale of $100,000 a year?

A. I don't have any record, no.

Q. Where did you get that figure?

A. It is so long ago, when I first started this.

[fol. 323] Q. When you first started this suit?

A. No, not this suit.

Q. Which suit, the one before?

A. In California. We were trying to figure out what the over-all picture was.

Q. This was when you had your lawyer Rosenthal out there?

A. Well, this is with Rosenthal and Weinberger.

Q. In California?

A. Partly in California and partly here in New York.

Q. And when you saw Mr. Rosenthal and Mr. Weinberger you gave them certain figures, didn't you?

A. Yes.

Q. Well, on the basis of the figures that you gave them, they had some computations made, is that right?

A. Well, yes, I expect so.

Q. Well now, you give me those computations, please?

A. Oh, I couldn't possibly remember.

Mr. Rosenblatt: Well then, on that basis, your Honor, I move to strike out the testimony offered previously by this witness that she lived at the rate of $100,000 while married to the defendant.

Mr. Winsten: That is objected to, if your Honor please.

The Witness: You are asking me to remember a lot of figures.

Mr. Rosenblatt: No foundation has been laid for any such testimony.

The Court: As to the figure itself, I will grant the motion; but as to the items she testified to specifically, the motion is denied. She testified as to what they did.

Mr. Rosenblat: Now, may it please your Honor——

[fol. 324] The Court: She testified that she paid a maid $250, $300 a month: she paid rent under a lease of X dollars: that they travelled to Europe two or three times a year.

Mr. Rosenblatt: They did not travel to Europe two or three times a year in any year, your Honor.

The Court: As many times as she testified she did. I

don't know. She also testified that she bought expensive dresses. Of course there is no testimony as to how much.

Mr. Rosenblatt: Now, may it please the Court, I submit that this witness be directed to tell me what the figures were, and how she made her calculations as to what amounts were spent and what amounts were left in the preparation of her tax returns.

The Court: As to her income?

Mr. Rosenblatt: That's right; and I will be specific, for the year 1949.

The Court: She testified that on several occasions she made some money for testimonials that she gave.

Mr. Rosenblatt: I want to know what the deductions were as against that money.

The Court: If she knows she can answer the question.

Q. Do you know?

A. Well, what do you want me to know? What are you trying to ask me?

Q. I am trying to ask you whether you know what your income was in the year 1949 and what the deductions were against it?

A. My personal income?

Q. Yes, your personal income.

A. I don't recall.

Q. Or in 1950? You don't know?

A. The only things I did, the only thing I did was [fol. 325] this testimonial and I believe I did three of them through the period that we were living together.

Q. Now, tell his Honor whether or not you joined with Mr. Vanderbilt in the making of joint tax returns?

A. Yes.

Q. And tell his Honor whether in the State of California you joined with Mr. Vanderbilt in asserting your right to community property from his income?

A. I don't understand that.

Q. You don't know what community property is?

A. I don't understand what you are talking about.

Q. Do you know what community property is?

A. Well, it means it belongs to more than one person, is that right?

Q. And how long did you live in the State of California, tell me again?

A. I spent a lot of time in California.

Q. And you were married before, and you still don't know what California community property is all about, is that it?

A. That is not what you asked me.

Q. I am asking you now whether you made tax returns in the State of California and claimed a community property right in the amount or not?

A. I don't know what is claimed about that in a tax return.

Q. I want to know whether you claimed in a tax return——

A. I don't know. I don't recall anything at all about all that community property in a tax return. What has that got to do with the tax?

Q. I show you what purports to be a taxpayer's copy, California individual income tax return for the calendar year 1950, and ask whether you ever saw this before?

[fol. 326] A. This has something to do with my husband here.

Q. With what? The question was, have you ever seen that paper before, yes or no, please?

A. Well, which one am I supposed to see? These are two entirely different things.

Q. I am asking you, have you ever seen any part of it before?

A. I don't recall seeing it.

Q. Do you know whether you made a tax return, and that that tax return was prepared by Kenney and Morris, attorneys at law, in Los Angeles, for you, in the State of California, for the calendar year 1950?

A. I know that in 1950 I made a California return, but who prepared it or anything else I don't know.

Q. And will you look at this——

A. I signed——

Q. What is that?

A. I signed a California return. That is the only thing that I know about it.

Q. You don't know anything else about it?

A. No.

Mr. Rosenblatt: May it please your Honor, I now press again for permission to introduce all of the files in connection with the Schroeder case on the question of the credibility of this witness?

The Court: Which Schroeder case?

Mr. Rosenblatt: The one which you barred and which was marked Defendant's Exhibit something for identification.

The Witness: I am telling you that I made a return but I don't recognize that this is it.

Mr. Winsten: Objection, your Honor.

Mr. Rosenblatt: May it please your Honor, these papers that I handed to the witness and purporting to be the California individual income tax return for the calendar [fol. 327] year 1950 for both Cornelius Vanderbilt, Jr., and Patricia Wallace Vanderbilt, were Defendant's Exhibit DD in evidence in the hearing at page 416 before Referee Lazar, and under the Civil Practice Act they are admissible here, and I offer this paper in evidence.

Mr. Winsten: That is an offer that was made before, if your Honor please, and I object to it on the same grounds.

Mr. Rosenblatt: I would like permission to bring you a brief on the subject, your Honor.

Mr. Winsten: The defendant wants to stay out of this Court and at the same time introduce a paper here upon which he cannot be cross-examined.

The Court: I will reserve decision on the offer.

Mr. Rosenblatt: May we have the respective returns marked now as one supposed exhibit?

The Court: For identification, yes.

Mr. Rosenblatt: That is the California 1949, 1950 and 1951.

(Marked collectively as Defendant's Exhibit K for identification.)

Q. I show you a photostatic copy of News Letter entitled Vagabonding with Vanderbilt, under date of March the 8th, 1953, and ask you if you have ever seen that before?

A. Am I supposed to read this whole thing?

Q. No. I'm just asking you if you have ever seen that before?

[fol. 328] Mr. Winsten: Are you referring to the particular issue, Mr. Rosenblatt, or if she is acquainted with the News Letter?

Mr. Rosenblatt: She said that she is acquainted with it, but I want to know about this particular one.

The Witness: I would have to read the entire thing to know whether I have seen this before. I have seen some of his.

Q. Have you seen that before?

The Court: Mr. Rosenblatt wants to know whether you have seen this particular one, Madam?

The Witness: Do I have to read all of this to know?

Mr. Winsten: Read some of it and see if you recognize it instead of reading the entire thing.

The Witness: I believe that I have seen a copy of this.

The Court: You have?

The Witness: I think so.

Mr. Rosenblatt: I am going to offer in evidence the first paragraph.

Mr. Winsten: I don't even want to see it. It is incompetent, irrelevant and immaterial, self serving and absolutely incompetent testimony regardless of what it contains, if your Honor please.

Mr. Rosenblatt: Exception. It is on file in this Court. Mark this for identification, please.

(Paper marked Defendant's Exhibit L for identification.)

[fol. 329] Q. Mrs. Vanderbilt, you told me yesterday you studied dramatics with Madam Ospenkaya, do you remember?

A. Yes.

Q. Did you ever appear in any plays as an actress?

A. I had two small parts practicing, rehearsing, at the school. I never appeared professionally, no.

Q. Hadn't you gone to a dramatic school before going to Madam Ospenkaya, called the Bliss Hayden School?

A. That's where I am saying I had two small parts as part of the schooling. This is not professional. This is learning. This is a school.

Q. And you said yesterday that you have to wear the

brace off and on. What brace are you talking about—the one around the neck?

A. Yes.

Q. That means, am I right, that you don't have to wear it all the time?

A. Oh, no, it is impossible to wear it all the time.

Q. And isn't it true that you have appeared at various times in New York City without wearing this brace since 1952?

A. Oh, yes. I wear it part of the day.

Q. Have you ever appeared in a courtroom without it?

A. I don't have it on right now.

Q. And it is not on today, or it is not on this morning or this afternoon, which?

A. I had it on this morning.

Q. And it is off this afternoon?

A. Yes.

Q. And is that also true about this special corset that you talk about?

A. I take that off and on also.

Q. Now can you tell me, please, whether or not when you talked to Mr. Rosenthal and directed him to bring a suit against Mr. Vanderbilt in New York City prior to the 1st of October, 1952, I want to know whether Mr. Rosenthal advised you as to your rights under the laws of California?

[fol. 330] Mr. Winsten: That is objected to, if your Honor please.

The Court: Objection sustained.

Mr. Rosenblatt: On what ground, your Honor? This is not a confidential communication, because she has already testified with respect to conversations with Mr. Rosenthal before the commencement of the action.

The Court: Objection sustained.

Mr. Rosenblatt: I respectfully except.

Q. Did you discuss with any person at any time the institution of any action against Mr. Vanderbilt in the State of California?

A. No.

Mr. Rosenblatt. That's all.

Redirect examination.

By Mr. Winsten:

Q. I now read to you from your petition in the proceeding entitled "In the Matter of the Application of Cornelius Vanderbilt, Jr. against The Domestic Relations Court" the following——

Mr. Rosenblatt: May it please the Court, I object to any such procedure whatsoever.

The Court: What's that?

Mr. Rosenblatt: It is a self-serving declaration of some kind.

Mr. Winsten: I am reading the same affidavit that counsel referred to on cross-examination, only the part that he did not read to the witness.

The Court: Is that in evidence?

Mr. Winsten: No, your Honor.

The Court: If it is not in evidence, how can you read it? [fol. 331] Mr. Winsten: For the purpose of refreshing the witness's recollection.

The Court: Show it to her, then. All you do is show it to her and ask her, "Does this refresh your recollection?"

Mr. Rosenblatt: If your Honor please, this is not proper redirect examination. The whole question was whether she got any money between November, 1952, and December, 1953, which she swore she has not.

Mr. Winsten: That's what I want to do right now, your Honor.

Mr. Rosenblatt: Now, she has answered that on cross-examination. What is the redirect examination to prove?

The Court: He can show it to her.

Q. I direct your attention to this portion of the affidavit and ask you to read it, please.

A. Where am I supposed to start? The only moneys?

Q. Yes.

A. Yes, yes.

The Court: Does that refresh your recollection? Give it back to counsel now, and ask her the question.

Q. Did you receive a $300 payment sometime in April of 1953?

A. No, I never actually received the money.

Q. Well, do you know whether your attorney received the money?

A. Yes, the attorneys were supposed to talk, and I believe that he was holding it, and then the discussions fell through, so then I did not ever take it.

Q. But you know your attorney actually received the $300 check, do you not?

A. Yes, but I did not receive it.

[fol. 332] Q. Now, Mrs. Vanderbilt, there was shown to you a voter's registration in Los Angeles in 1950, in which you indicated that your place of birth was the State of Indiana, and your marriage certificate or marriage license in which your place of birth was stated as Hawaii. Can you account for the fact that in those two different instruments your place of birth was indicated as two different places?

A. Yes. I had been told as a child by different people on the one hand that I was born in Honolulu, and then on the other hand that I was born in Indiana; and so for a great number of years I was never sure as to where I was born.

Q. Now, between the time you were married in 1948 and the time you filed your voter's registration in 1950, did anything occur whereby you definitely ascertained whether it was one place or another?

A. Yes. I had to get a birth certificate for the passport bureau.

Q. And when did you procure that passport?

A. In 1949.

Q. And then in 1949 did you procure a birth certificate from any place?

A. From Indiana.

Q. And is that the reason why in 1950 when you gave your place of birth in your voter's registration in California, that your place of birth was in Indiana?

A. Yes.

Q. Now, Mrs. Vanderbilt, did your husband ever have occasion to write to you concerning this matter of having a codicil made to his mother's will?

A. Yes.

Q. I show you this paper and ask you whether—I with-

draw that. I show you this letter and ask you who wrote that letter to you?

A. My husband wrote it.

[fol. 333] Q. When was it written?

A. Early in 1950. It is not dated, but it is early in 1950.

Q. About what part of the year would you say it was?

A. This is the time when he is talking about the will, and this is before the signing of the codicil to the will, and that was signed early in June, so this is the first part of the year.

Mr. Winsten: I offer it in evidence.

Mr. Rosenblatt: I object to it upon the ground that on her direct examination she said he had written her. No questions were asked on cross-examination. It stands undenied in the record that he had written her something about the will, and I think that under those circumstances this is irrelevant and immaterial. I had better read it. I have never seen it before. Could I have a preliminary examination on this for a moment?

The Court: Absolutely.

Mr. Winsten: I will hold that up for the moment.

Q. Now you were cross-examined concerning what you saw in the defendant's medical report issued by the United States Army. I show you this paper and ask you whether that is a photostatic copy of the Army medical report that you referred to in both your direct examination and in your cross-examination?

A. Yes.

Mr. Winsten: Now, your Honor, in order not to extend, unduly extend the record, I offer particularly the last page of the report.

[fol. 334] Mr. Rosenblatt: And I object to this as the sheerest hearsay, not binding in any way, shape, form or manner, upon the defendant under any conceivable circumstances; and further, upon the ground that this was one of the papers which the plaintiff says she took that belonged and was carried in a typewriter case of the defendant, so that it consists of stolen property, in addition to being complete hearsay. I think it is outrageous it should even be offered. I have never seen it before.

Mr. Winsten: I would like to clarify my position, your Honor. I did not offer this paper on direct examination because I wanted to suppress it. I did not feel that it should be offered; but in view of the slashing cross-examination that counsel had of this witness concerning that very same thing, and referring to certain things in extenso concerning mental conditions, has required that I offer it at this time, not because I wanted to, but in order to show this Court that there was more than plaintiff's mere statement to back up this assertion, and I think this Court deserves to have this corroboration.

Mr. Rosenblatt: Your Honor, for all your Honor knows, that may be a sheer forgery of a type of document coming from no place, verified by nobody, it is exemplified by nobody. It is complete, utter and ridiculous hearsay.

Mr. Winsten: If it is a forgery, it came from the defendant's custody, as the witness has testified, and certainly the defendant should know whether it is a forgery or not. [fol. 335] Mr. Rosenblatt: Your Honor, I don't know of any requirement that permits any such paper in evidence.

The Court: Her testimony is that she was concerned about his mental and medical capacity, that he had shown the traits that she said he showed, that is, being hateful of everybody and critical of everybody and distrustful of everybody, and treating her in the manner that she has described: and it was after she had seen this alleged medical report from the Army that she came to the conclusion, as she testified, that he was mentally and medically sick. That is her testimony, upon which subject you cross-examined her as to where she obtained that information and how she came to that conclusion, and what his medical ailments that she claimed he had and what his mental ailments were, and her testimony was to the effect that it was based on this medical report that she had seen and that she had discussed with him so much so that she had even suggested that he go to a doctor, which he agreed to do, and subject himself to medical care. You of course, tried to attack her credibility on that point.

Mr. Rosenblatt: This is merely hearsay upon hearsay.

The Court: You examined her upon that point and you want to know how she got that information and where she got it, on what her conclusions were based.

Mr. Rosenblatt: She did not testify that they were based only on this. She said she was experiencing her thinking a long time before she ever saw this.

[fol. 336] The Court: And when she saw this then she came to the conclusion that he was sick.

Mr. Rosenblatt: She is no psychiatrist, doctor, medical person, or anything of the kind. This is the sheerest, ranking hearsay possible, your Honor, certainly not binding in any way at all upon this defendant.

The Court: It is not binding on this defendant except that it will corroborate the testimony of this witness.

Mr. Rosenblatt: I might make up something myself and corroborate the testimony of this witness.

Mr. Winsten: The best way, your Honor, to do it, is to bring this defendant into court and do some corroboration.

Mr. Rosenblatt: I want your Honor to make a ruling right now that there is no requirement to bring the defendant in this court.

The Court. There is none. Now what part are you offering?

Mr. Winsten: The last page, if your Honor please.

(Conference between the Court and counsel at the bench.)

Mr. Rosenblatt: I have no reason to doubt that she saw some medical reports. I will state that for the record.

(It is hereby stipulated for the record that in lieu of introducing the document in evidence counsel for the defendant is stipulating that at some point which the plaintiff has testified to she saw a medical report from the Army.)

[fol. 337] The Court: Now what about the letter, Mr. Rosenblatt?

Mr. Rosenblatt: I have now read this letter. I think that this is completely unimportant on any question presented here up to now.

Mr. Winsten: That is also offered, if your Honor please, for corroboration.

Mr. Rosenblatt: I am agreeable, however, to stipulate that she received a letter from him with respect to the mother's will.

Mr. Winsten: That letter goes a little further than that, your Honor.

Mr. Rosenblatt: And the letter covers a great many more subjects, too.

Mr. Winsten: I am willing to exclude extraneous, but I am particularly concerned with what related to the codicil and the corroboration of the plaintiff's testimony in that respect.

The Court: Do you press this?

Mr. Winsten: Yes, your Honor.

The Court: Mark it in evidence, only that portion that is relevant to this case.

(Received in evidence and marked Plaintiff's Exhibit 16.)

Q. Who is the person named "Nick" or "Nicky" that is referred to in Plaintiff's Exhibit 16?

A. That is Colonel N. Henry Josephs.

Q. And who is the person referred to as "Ed"?

A. That is Ed Tamm.

Q. Now, Mrs. Vanderbilt, did you ever withhold any films belonging to the defendant?

A. No.

Q. In the month of June, 1952, before the defendant's departure from California, his final departure from Cali- [fol. 338] fornia, did the defendant take anything with him that you noticed?

A. Yes, he took everything. There was very little left except some empty reels.

Q. By the time he finally left, was there anything belonging to the defendant that remained?

A. Only those empty reels that had to do with the film work.

Q. Had he taken all his clothes?

A. Yes.

Q. Had he taken all his equipment?

A. Yes.

Q. And when you prepared to pack these things prior to removal from the house, was there anything of the defendant's that you had to pack?

A. Only these reels and some swimming trunks and swimming robes.

Q. Was there any truth to the defendant's allegations or accusations concerning your having an affair with a person named Charles Isaacs?

A. No.

Q. Was there any truth to his allegations concerning any relationship between you and a person called Drummond?

Mr. Winsten: Is that the name, Mr. Rosenblatt?

The Court: Grunman.

A. No.

Q. Were you ever served in any action brought by the Hotel Algonquin for charges incurred?

A. Yes.

Q. I show you this summons and I ask you whether that was served on you?

A. Yes.

Q. And for what period of time does this cover?

A. I don't know what period of time, but Mr. Vanderbilt had stopped the credit and I remained there for a period of time, and this summons is for the amount of money [fol. 339] owing for that latter period of time until they asked me to leave.

Q. That was during the year 1953?

A. That is right.

Mr. Winsten: I offer that in evidence.

Mr. Rosenblatt: I object upon the ground it is proof of nothing except what she has already testified to, which is that she was sued by a summons by the Hotel Algonquin.

Mr. Winsten: It is material to this point: counsel developed on cross-examination that she stayed at the Hotel Algonquin on the defendant's credit. This proves that that is not so.

Mr. Rosenblatt: I beg your pardon.

Mr. Winsten: She is being sued for the very stay that she was there on his alleged credit.

Mr. Rosenblatt: May it please the Court, that isn't so, either. She was the one who offered on direct testimony that she was staying there under a diner's card, she said. Then I asked her what this diner's card was. She said it was a charge account. I said, "Charged to whom?" She said, "Mr. Vanderbilt." So I assumed, and I had a right

to assume, that she was staying there, charging these things to Mr. Vanderbilt's credit.

Mr. Winsten: I simply want to correct any erroneous impression that the record may show that Mr. Vanderbilt paid for the plaintiff's stay.

The Court: Counsel can say that he did not pay.

Mr. Rosenblatt: I don't know whether he did or didn't, and I don't know whether this is in addition to what Mr. [fol. 340] Vanderbilt may have had to pay. I don't know anything about that, and if that case is pending, I don't know about that, either.

The Court: Then we will have to go into that. They contend she was not supported and she was destitute, it is part of the claim in this case.

Mr. Winsten: All I want the record to indicate by this is that an action was brought against this plaintiff by the Hotel Algonquin for her board bill during the year 1953 which the hotel claims was not paid by the defendant. That is all.

The Court: Is that conceded?

Mr. Rosenblatt: If the wording is changed to "a board bill," I would say that that is a correct statement.

The Court: All right.

Mr. Winsten: Well, the only thing is——

Mr. Rosenblatt: The complete statement——

Mr. Winsten: (Continuing) —a board bill for the plaintiff's board and lodging.

Mr. Rosenblatt: And, I assume, for her daughter?

Mr. Winsten: And for her daughter, yes, that is right.

The Court: All right.

Mr. Winsten: All right. That is all, sir.

Recross-examination.

By Mr. Rosenblatt:

Q. Yesterday, Mrs. Vanderbilt, we had in evidence your marriage application on your marriage to Mr. Vanderbilt which showed that you were born at a certain time and in the Hawaiian Islands. Yesterday when I asked you the [fol. 341] following at page 185 of the record, "Q. Mrs. Vanderbilt, when and where were you born?" Your an-

swer was, "I am not sure, I don't know." Today, when I offered in evidence your voting registration in the State of California, which carried an Indianapolis birthplace, you now, in answer to your counsel's question say you were born in Indiana. Which is correct, Mrs. Vanderbilt, your testimony that you were not sure and that you don't know when and where you were born, or that you were born in Indiana?

A. I still do not perfectly feel as though I know. I have been told two things and I have seen an Indiana birth certificate, supposedly concerning me. I have no way of determining anything concerning all of this.

Q. Mrs. Vanderbilt, were you ever known as anything but Patricia? Were you ever known as Thelma?

A. As a child, yes.

Q. Was that just Thelma or Ruth Thelma?

A. Or what?

Q. Or Ruth Thelma?

A. Ruth what?

The Court: Ruth Thelma.

A. No, no. I was known as Thelma. I was baptized Patricia.

Q. And would you tell me when you made an application for your passport—I believe the first time you went abroad with Mr. Vanderbilt was in the year 1949—where did you apply for and receive your passport?

A. In New York.

Q. And what address and birthplace did you give then?

A. I gave the birth certificate, the Indiana birth certificate.

Q. From Indiana?

A. That is right.

[fol. 342] Q. Mrs. Vanderbilt, I show you what purports to be a signature with a "Me, too" and ask if that is your handwriting?

The Court: Is it?

The Witness: Yes.

The Court: It is.

Mr. Rosenblatt: I offer it in evidence.

Mr. Winston: No objection. Do you want to give me a copy?

Mr. Rosenblatt: Certainly.

(Paper received in evidence and marked Defendant's Exhibit M.)

Q. I show you a paper writing of three sheets and ask whether these are in your handwriting?

A. Yes.

Q. Both of them? They are one letter, aren't they?

A. Is this one letter?

Q. That is right?

A. Yes, they are one letter.

Mr. Rosenblatt: I offer these in evidence. Here is your copy, Mr. Winsten.

Mr. Winsten: No objection.

The Court: You sign your name, "Me, too." He signs, "Me," is that it?

The Witness: (Nodding yes.)

(Letter received in evidence and marked Defendant's Exhibit N.)

The Witness: Do I understand these are supposed to be correct translations of my thing, because I didn't look at your translations?

The Court: That is all right.

Mr. Rosenblatt: You can certainly look at them.

[fol. 343] By Mr. Rosenblatt:

Q. I want to know whether from reading this exhibit N, you can tell me when, or approximately when, it was written? Would it be in the latter part of the year 1950, because of the reference to R's or Headquarters? It is very difficult to read that. Would you like to read this translation?

A. No, I can read my own handwriting.

Q. That is more than I can do. I just want to get the approximate date, if you can give it to me.

A. I would say it was some time in——

Q. What is that?

A. It must be some time in 1950.

Q. Would you say it is in the latter part of 1950?

A. I don't know, because I get the "R's" are the

Roosevelts, and we saw the Roosevelts throughout the year.

Q. Look, Mrs. Vanderbilt, it is getting very late. This letter of yours of February 1951 says that you are having to have the Crestview 1-3034 number changed. Do you notice that?

A. Yes.

Q. And you notice that in this letter which I am asking you about now, it says Friday morning, you say that you have sent a wire to some lady, "telephone me at Crestview 1-3034." So that this last exhibit must have been written before the first one?

A. Possibly. I don't recall whether I had that number changed or not.

Q. Is it possible that this exhibit N may have been written subsequent to exhibit M?

A. I don't know. You see, I was going to have it changed. I don't know whether I did, because there are two or three different phone numbers in the house.

Q. In other words, you don't know when this was written? It might have been written in 1951, exhibit N?

[fol. 344] A. No, it is talking about the Roosevelts and about Mr. Roosevelt's speeches.

Q. Can't you tell me when?

A. I say 1950.

Q. Sometime in 1950?

A. That is right.

Q. All right, thank you. I will take the other one now.

Mr. Rosenblatt: Now, may it please your Honor, I respectfully——

Mr. Winsten: Which one are you referring to as 1950?

Mr. Rosenblatt: This last one.

I respectfully re-offer as one exhibit those exhibits which I previously offered comprising joint tax returns of both parties and which have been marked; these four papers, as Defendant's Exhibit K for identification, under the provisions and pursuant to provisions of Section 348 of the Civil Practice Act.

The Court: We will hold that in abeyance until tomorrow. Counsel, you read the statute between now and tomorrow.

By Mr. Rosenblatt:

Q. Just one question further Mrs. Vanderbilt. In your letter, exhibit M, you say, "It was good to see your old friend Harmon again." Do you know Jack Harmon?

A. I know him from a couple of times, that is all.

Q. From having seen him a couple of times?

A. That is right.

Q. And you had seen him, according to this letter at cocktails given by somebody named Joan, is that right?

A. Yes.

Q. Was that Joan Baruch?

A. Yes. There were about four, five, or six.

[fol. 345] Q. Will you tell us whether Mr. Harmon is sitting in this court room?

A. I believe that to be him there.

Mr. Rosenblatt: Would you stand up there?

(A gentleman arose in the court room.)

Q. Is the man who just stood up Mr. Harmon?

A. I believe that is he.

Mr. Rosenblatt: That is all.

(Witness excused:)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Does that end your case?

Mr. Winsten: Yes, with the exception of certain formal proofs, if your Honor pleases.

The Court: Do you have it here now?

Mr. Winsten: Well, as I told your Honor, it is about my services. If your Honor would accept an affidavit subject to Mr. Rosenblatt's right to cross-examine me at a subsequent time, if he thinks it is necessary, I think we can complete my case.

The Court: Whatever Mr. Rosenblatt does if you can agree on it, it is all right with me.

Mr. Winsten: I would like to submit an affidavit in lieu of my testifying with respect to my services, and if you feel you want to cross-examine me at a subsequent time with respect to it, it would be perfectly satisfactory.

Mr. Rosenblatt: That would and should be agreeable, your Honor.

The Court: All right. If you change your mind later on, we can hold his testimony in abeyance any way, we [fol. 346] can always put him on at the end, if you change your mind. If you want to follow his suggestion, it is all right with the Court.

Mr. Rosenblatt: What does the plaintiff do now?

The Court: I am asking him now.

Mr. Winsten: I want to have marked in evidence a supplemental affidavit that I gave you a copy of this morning from the Hanover Bank.

Mr. Rosenblatt: Wasn't it marked?

Mr. Winsten: It wasn't marked yet.

Mr. Rosenblatt: I think it was marked Plaintiff's Exhibit 15.

Mr. Winsten: This is a second affidavit of Mr. Menier.

Mr. Rosenblatt: Call it 15-A.

(Affidavit received in evidence and marked Plaintiff's Exhibit 15-A.)

Mr. Winsten: Does the Court wish to see this now? It is simply a clarification of the previous exhibit.

The Court: You mean of the bank situation?

Mr. Winsten: Yes.

The Court: Go ahead.

Mr. Winsten: With the reservation as to proof of my services on behalf of the plaintiff in this action, and subject to any further proof that we may adduce with respect to the defendant's wealth and assets, the plaintiff has completed her case. When I say further proof with regard to defendant's wealth and assets, I should like to clarify my position on the subject.

[fol. 347] We moved at Special Term for an examination before trial, among other things, of the defendant with respect to his wealth and assets. Opposition was made to that motion on the ground that under the prevailing law, the general rule is that in a matrimonial action we must establish our rights first, and for that reason the motion was denied with respect to that item. Therefore, we were unable to make any investigation as to the defendant's assets from the defendant himself, and the

only thing that we had available to us was what we could otherwise gather, and I should like to have the plaintiff's rights preserved with respect to that, to furnish any additional proof subject to a further inquiry and examination concerning the defendant's assets.

The Court: In the event you are successful in this case.

Mr. Winsten: Yes, your Honor.

Mr. Rosenblatt: May it please your Honor, either this case has been tried or it hasn't been. This is a non-resident, Mr. Vanderbilt, and I don't believe the Court at this time had any right to make any determinations insofar as what is to transpire in the future is concerned, and I demand, subject of course, to this affidavit and the right that has been given me to cross-examine in connection therewith, that the plaintiff either continue with her case or that she rest, one of the two.

The Court: Well?

Mr. Winsten: If your Honor pleases, I believe it is within the equity powers of the Court in an equity case——

[fol. 348] The Court: I will reserve decision on your request.

Mr. Winsten: That is the plaintiff's case.

The Court: Plaintiff rests.

I will reserve decision on his request that he reserve his right to inquire into the financial ability of the defendant in the event that *that* he is successful in this lawsuit.

Mr. Rosenblatt: I understand, sir.

Motion for Judgment Dismissing Complaint and Ruling Thereon

Now, may it please the Court, on behalf of the defendant I move for judgment dismissing the complaint on the following grounds: 1, the plaintiff has failed to sustain the burden of proof which was upon her to demonstrate the invalidity of the Nevada decree of divorce defendant procured against plaintiff on June 30, 1953; 2, the said Nevada decree of divorce must be given full faith and credit and bars plaintiff from maintaining this action; 3, the plaintiff was not a resident and domiciliary of New York continuously for one year prior to the time the Nevada decree was rendered against her; 4, insofar as

Civil Practice Act, Section 1165-A, subdivision 3, is applied herein to permit plaintiff to complete the residential requirements therein specified for the purposes of commencing this action after she has been divorced by defendant in Nevada, said Section violates the Federal Constitution and is void in that, among other things, it prevents the giving of full faith and credit to defendant's Nevada decree of divorce as of the time when the same was rendered and became effective in the State of Nevada; 5, the plaintiff is estopped to impeach the validity of the Nevada [fol. 349] decree because of her unsuccessful attack thereon in her prior separation action against defendant; 6, this Court does not have jurisdiction over the subject matter of this action or of the parties thereto; 7, that the plaintiff has not proved the allegations of her complaint, and in connection with such motion which I have made to dismiss, I further move to strike out all testimony and alleged evidence offered on plaintiff's behalf with respect to defendant's domicile upon the ground that the plaintiff had failed to plead any affirmative attack on the validity of the said Nevada decree of divorce procured by defendant against her.

The Court: What have you to say, counsel, about——

Mr. Winsten: With respect, if your Honor pleases——

The Court: I just want to hear you on one point at a time, on the question of the domicile of the defendant in Nevada and attacking that decree. You have the burden there.

Mr. Winsten: At this point I haven't attempted to interpose any proof with respect to the domicile of the defendant. I only interposed proof in my plaintiff's case with respect to the allegations in the complaint.

The Court: As to what, cruel and inhuman treatment?

Mr. Winsten: Cruel and inhuman treatment and abandonment. I have not attempted in my prima facie case to go into that question. If the defendant then says he is going to rest, I want to proceed to go into that proof. I [fol. 350] don't know what proof he intends to produce with respect to that. Is his proof complete on his defense?

The Court: We are not on his defense. We are still on plaintiff's case. We tried both issues at one time. He

wanted to separate both issues, to try the issue of the Nevada situation first, and then try the separation action, after disposing of that.

Mr. Winsten: If that is the case, then I want to offer some further testimony with respect to domicile, if your Honor pleases.

The Court: That is——

Mr. Winsten: I was under the impression that I was being limited to my prima facie case only.

The Court: Well, you were trying both things at the same time.

Mr. Winsten: I was under the impression that after I had completed the proof under my prima facie case of the allegations of cruelty and abandonment, that I would then be able to procede. I can do that in very short order.

The Court: I know, but I made a ruling on this at the beginning of the trial when Mr. Rosenblatt made his motion at the opening, and I said, "The defendant's motion for a prior and separate trial of the issue of the bona fides of the Nevada domicile is denied," and then I concluded by saying that, "the orderly procedure therefore required a denial of the defendant's motion and the plaintiff will proceed with her proof as pleaded in the issues raised."

Mr. Winsten: Yes, her proof as pleaded is the issue of the abandonment and cruelty. An affirmative defense is [fol. 351] then put in, and I have the right to rebut it in my rebuttal, and if your Honor wants to have the proof all on the plaintiff's case, I will do it. I thought that I was preserving the orderly procedure of trial by simply going into the question of the allegations of my client and then letting the defendant exhaust his proof under his defense, and then I could come in for proper rebuttal under the statutory issue of my denial of his affirmative defenses. That was my impression of the order of proof.

(Discussion ensued off the record.)

The Court: The Nevada decree is in evidence.

Mr. Winsten: If that is his defense, then I will proceed with my rebuttal.

The Court: His defense insofar as the Nevada domicile is concerned.

Mr. Rosenblatt: May it please your Honor, the burden

is upon this plaintiff, the way you have already ruled in this case, not only to establish her case, but the burden is still on her to show that there is no validity to that Nevada decree.

The Court: And you agree with that?

Mr. Winsten: Well, I agree with that in this respect: I recognize the burden of proof, but not the burden of going forward with evidence.

The Court: But we have it already in the record as counsel has indicated. He says he has offered the decree in evidence and as far as he is concerned that is the defense to that.

[fol. 352] Mr. Winsten: Then I am prepared to proceed now with rebuttal to that defense.

Mr. Rosenblatt: I would like to say this: I haven't either rested or put in a defense yet, and I take it that the plaintiff is attempting to fulfill the burden that is upon the plaintiff. I have a time and place, after my motions are disposed of. I understand that.

The Court: Well, I am reserving decision on all your motions, on every point that you make.

Mr. Rosenblatt: I understand that.

(Discussion ensued off the record.)

The Court: Suppose you proceed with your evidence on domicile, but we are not going to do it now. We will have to wait until tomorrow morning. You say it will take how long?

Mr. Winsten: Not more than a half an hour.

(Further discussion ensued off the record.)

Mr. Rosenblatt: Is this now reopening of plaintiff's case?

The Court: That is right, on domicile.

Mr. Rosenblatt: And it is part of plaintiff's case?

The Court: We will recess until 9:30 tomorrow morning.

(Recess was thereupon taken until 9:30 o'clock A. M., January 13, 1955.)

[fol. 353]

New York, N. Y.,
January 13, 1955,
9:30 A. M.

Trial Continued

Appearances: (Same as heretofore.)

Mr. Winsten: If the Court pleases, there has been some testimony in the record that a newspaper columnist by the name of Charles Venture is an intimate friend of the defendant. The World Telegram of yesterday, there appeared in that column something that has been apparently designed to come to the attention of this Court, and I would like to be heard on that point.

The Court: But I did not read the Telegram last night. I don't know anything about it and I don't want to hear about it. Even if I did, it would not influence my decision in this case one way or the other. I am interested in the evidence that I get from the witness stand.

Mr. Winsten: If your Honor pleases, off the record——

(Discussion between the Court and counsel off record.)

Mr. Winsten: I would now like to ask counsel for the defendant if the defendant is going to be produced as a witness here?

Mr. Rosenblatt: May it please the Court, I know of no requirement requiring the production, as he calls it, of the defendant in this court room.

[fol. 354] Mr. Winsten: I am not saying that there is any requirement, your Honor. I am merely asking whether he will be produced?

Mr. Rosenblatt: So far as I am concerned I will decide that upon the defendant's case, if we go that far.

Mr. Winsten: I would like to have this Army report marked for Identification.

(Paper marked Plaintiff's Exhibit 18 for Identification.)

PATRICIA W. VANDERBILT, resumed:

Redirect examination.

By Mr. Winsten (continued):

Q. Now, Mrs. Vanderbilt, were you ever in the State of Nevada?

A. I was there for about ten hours once in the early 1940's with my first husband, that's the only time.

Q. Have you ever been in the State of Nevada with the defendant in this action?

A. No.

Q. Now were you served with what purports—I withdraw that. Were you ever served with any papers in the State of Nevada in this action brought by the defendant against you in the State of Nevada?

A. Was I served in Nevada?

Q. In the State of Nevada?

A. No, I have never been in the State of Nevada since that time I just said, about 1944 or so.

Q. Did you ever appear or authorize anybody to appear in the action brought by the defendant in the State of Nevada-

A. No.

Q. In the action in which Defendant's Exhibit I, a decree of divorce, was rendered in the courts of the State of Nevada—I withdraw that, and will reframe the question.

[fol. 355] Did you ever appear——

A. No.

Q. (Continuing) —in the action in the State of Nevada in which this Defendant's Exhibit I, the decree of divorce, was rendered in favor of the defendant in this action?

A. No.

Q. Did you ever participate in any of these proceedings?

A. No.

Q. Did you ever authorize anybody to appear for you in those proceedings?

A. No.

Q. Did you ever authorize anybody to participate in your behalf in those proceedings?

A. No.

Q. Did you ever file an answer in those proceedings?

A. No.

Q. Now, Mr. Rosenblatt read a portion of an affidavit yesterday, your affidavit, to the effect that you were served with some papers in that Nevada action in which the Defendant's Exhibit I was a judgment. Where were you served with those papers?

A. In New York City.

Q. And when was that?

A. Sometime in 1953.

Mr. Rosenblatt: The affidavit which was read shows the date.

The Witness: I think it was about June, I am not sure.

The Court: Why can't we have some concessions on this record upon matters which are apparent and about which there is no question?

Mr. Rosenblatt: Nobody is arguing about all this.

The Court: There is no claim that she was served in Nevada or appeared in Nevada. As a matter of fact, the arguments of counsel have definitely stated in the record that this is an ex parte decree obtained in Nevada without the appearance of this plaintiff: She did not appear, ex- [fol. 356] cept she was served in New York with the papers. That is conceded, isn't that right?

Mr. Winsten: Is that conceded, Mr. Rosenblatt?

Mr. Rosenblatt: Certainly, it has never been questioned.

Mr. Winsten: Up to now the record has not shown it.

The Court: All the arguments and statements in the record have shown it.

Mr. Rosenblatt: The affidavit which Mrs. Vanderbilt referred to was sworn to on the 19th day of June, 1953, in New York, and she says that on June 9, 1953, she was handed the summons and complaint in that action.

Mr. Winsten: Will counsel further concede that the summons in the Nevada action was served by publication?

Mr. Rosenblatt: I will concede that it was served on her personally here in New York, plus publication.

Mr. Winsten: All right. Now, your Honor, on the question of the admissibility of the income tax, copies of the income tax returns, I believe your Honor kept that question open last night.

The Court: I will rule on it later on.

Mr. Winsten: I just wanted to indicate to the Court this added fact, which was not brought out last night:

That in a prior proceeding the issue was domicile, that these income tax returns were admitted only for the purpose of indicating that the defendant stated in those income tax returns that he had a Reno, Nevada, either residence or [fol. 357] domicile, I don't know which, but that was the purpose for which they were admitted at that time and for that limited purpose only.

There was no admission of those income tax returns for the contents other than that, and I am willing to stipulate right now on the record with counsel to avoid the necessity of any question of the admissibility of that, I will so stipulate at this time that in those income tax returns he indicated Reno, Nevada, as his address, or what have you.

Mr. Rosenblatt: No, I don't accept the concession, your Honor. The income tax returns were taken—the income tax returns that we talk about are from both Mr. and Mrs. Vanderbilt. Secondly, they were admitted in the previous proceeding for all purposes.

Thirdly, the question of domicile is certainly just as important in this case and has proved so to be as it was in the prior proceeding; and if admissible in the same proceeding between the same two people, and the defendant is a non-resident of New York—which I hope will be conceded on this case—and certainly they are admissible in this case for all purposes.

Mr. Winsten: Then I press my objection on that. Now I should like to read into the record in lieu of offering—I withdraw that.

The Court: That is Section what?

Mr. Rosenblatt: 349, sir.

Mr. Winsten: I should like to have deemed marked in evidence a file paper in the first action under File No. 31362 [fol. 358] of 1952, the affidavit of Cornelius Vanderbilt, Jr., the defendant in this action, sworn to November 18, 1952, and I will read into the record the pertinent portions of it, and I refer to page 2 of the affidavit:

"The true facts concerning my domiciliary history for many years last past and down to the present and that of my wife and self at least since our marriage are as follows:

"Prior to the time I married the plaintiff on September 8, 1948, in Greenwich, Connecticut, both she and I were residents of California.

"In 1945 I resided at the Claremont Hotel in Berkeley, California.

"In 1946 I resided at the Sunset Towers in Hollywood, California.

"In 1947 I rented a house at 8476 Harold Way, Hollywood, California, which lease I maintained until the spring of 1948. During this period I met the plaintiff who was then residing in her own apartment at South Robertson Boulevard in Los Angeles, California. She had resided in California continuously for a number of years."

Then on page 4:

"I am now lecturing in the States in the East in order to be near my mother, but it has been and still is my intention to return to my permanent domicile in California as soon as possible. It has always been my intention since I established my domicile in California in or about the year 1945, and still is my intention to maintain California as my [fol. 359] permanent domicile, and to return there despite the fact that I am obliged for business and personal reasons to depart therefrom from time to time. Substantially all of my personal possessions, with minor exceptions, are located in California, as are those of my wife. We have an automobile in California which is registered there in my wife's name. We also have a large number of cases containing personal effects in storage in Beverly Hills and California."

Now I should like to read into the record one paragraph of that report, if your Honor pleases.

Now, the Referee's report has already been deemed marked in evidence, and I read from page 5, paragraph 11, of the report of Referee Lazar, dated January 13, 1953:

"The consideration of the activities of the parties in their four years of married life will serve to clarify their intentions as to domicile and their conduct which confirmed it.

"At the outset it should be noted that the question is rendered much more difficult in the present case by the

fact that the defendant husband is by profession a lecturer, writer and traveler. During all of the four years of this marriage his travels occupied the greatest part of his time. At the same time he was of necessity conscious of the problem of domicile. He had ultimately given Nevada and California as his State of residence, depending upon considerations affecting automobile registration, [fol. 360] passport application, taxes, pending and prospective litigation and the press of judgment creditors.

"The plaintiff has alleged that her residence is at 1048 Fifth Avenue, Borough of Manhattan, City of New York, which address is the Vanderbilt Mansion at 86th Street and Fifth Avenue, New York, New York, formerly owned by defendant's mother, Mrs. Cornelius Vanderbilt, Jr. This residence, which was sold by Mrs. Cornelius Vanderbilt, Sr., in 1940, is still her residence under a reserve life estate retained by her."

Now I would like to have deemed marked in evidence——

Mr. Rosenblatt: May I get my record straight a little bit? Which one is this affidavit of November 18th deemed marked in evidence as plaintiff's or defendant's exhibit what?

Mr. Winsten: Haven't you offered that in evidence before?

Mr. Rosenblatt: No.

Mr. Winsten: I am sorry. Let us have it deemed marked now.

Mr. Rosenblatt: Deem it marked as Plaintiff's Exhibit something. We have always given numbers to everything we have deemed marked.

Mr. Winsten: All right, let us have that done.

Mr. Rosenblatt: This is an affidavit of Cornelius Vanderbilt, Jr. sworn to on the 18th day of November, 1952.

Mr. Winsten: And I would like to have deemed marked [fol. 361] in evidence the part I just read.

(Received in evidence and deemed marked Plaintiff's Exhibit 19.)

Mr. Winsten: And the part that is deemed marked is the portion read into the record.

The Court: That is the defendant's affidavit of November 18th?

Mr. Rosenblatt: 1952.

Mr. Winsten: I should like to have deemed marked in evidence the portion that I am about to read of the affidavit of Cornelius Vanderbilt, Jr., sworn to January 15, 1953, made in the prior separation action between the parties under File No. 31362 of 1952 of this Court, and I am referring to page 3:

"Immediately upon the conclusion of the hearings before the Referee on December 16, 1952, I went to California for my business, thereafter visiting friends in the West, and did not return to New York until after my mother's death on January 7, 1953.

"The three other co-executors of my mother's last will and testament and codicil have filed a petition for probate thereof in the Surrogate's Court, New York County, designating me in such petition as a resident of California.

"I am about to file in said court instruments duly executed by me to qualify as a fourth executor, including my oath and designation of the Clerk of said court as a person upon whom process may be served in lieu of per- [fol. 362] sonal service upon me. In said instruments I have designated my true residence as being Beverly Hills, California."

May the last affidavit that was deemed marked be given an exhibit number.

(Received in evidence and deemed marked Plaintiff's Exhibit 20.)

Mr. Winsten: I should now like to offer in evidence a portion of the defendant's News Letter entitled "Vagabonding with Vanderbilt," dated February 10, 1953, and in lieu of offering the entire document in evidence I would like to read one paragraph thereof.

Mr. Rosenblatt: May it please your Honor, you recall that yesterday when I asked to introduce a paragraph in some News Letter of March 8, 1953, your Honor would not permit it.

The Court: On the basis that it is a self-serving declaration.

Mr. Winsten: That's right, sir, and I am offering this as an admission.

Mr. Rosenblatt: Your Honor, part of the method of proving domicile is by self-serving declarations.

Mr. Winsten: But he is not in court, and that is the difference, if your Honor please.

Mr. Rosenblatt: It does not make any difference where he is.

Mr. Winsten: It is an extra-judicial document which is a self-serving declaration, and there is a difference.

The Court: What is your offer now?

Mr. Winsten: I offer this paragraph as an admission, if your Honor please?

[fol. 363] Mr. Rosenblatt: Your Honor, I think this is evidence of nothing and I object to it.

Mr. Winsten: It is the bottom paragraph, your Honor.

The Court: How is this relevant? What does this show?

Mr. Winsten: This say- that he has no home.

The Court: I am not going to take that interpretation from this.

Mr. Winsten: I would like to get it into the record as an admission with respect to what the defendant regards himself as, where the defendant regards that his home is.

The Court: Where does it say that he regards his home?

Mr. Winsten: He says he has no home.

The Court: I don't put that interpretation upon it.

Mr. Winsten: "Because I admitted I was constantly roving and roaming and really had no home at all."

The Court: That's what he say- the Referee said.

Mr. Winsten: "Yet, the more I think about it, the better I like the term, the more I believe it really fits me." He is adopting that statement, if your Honor please.

Mr. Rosenblatt: I move to strike out counsel's statement. It is a method of introducing evidence by indirection.

Mr. Winsten: We have no jury here.

Mr. Rosenblatt: It does not make any difference.

[fol. 364] Mr. Winsten: I would like to offer that paragraph, if your Honor pleases.

The Court: I will tell you right now that it will not affect the question of domicile as far as I am concerned, that statement of his. It does not indicate anything and

there is no question here throughout the testimony in this trial, and I think there is no question about it even on the defendant's part, that this man was a traveler. He did travel from place to place for the purposes that he wanted to, either for lecturing or for taking pictures, and he did that constantly.

Mr. Rosenblatt: That's right, your Honor. There is no issue on that at all.

The Court: You admit that, don't you?

Mr. Rosenblatt: Certainly.

Mr. Winsten: What I am trying to develop, your Honor, is this——

The Court: And he says that he does go from place to place, in that letter.

Mr. Winsten: What I am trying to develop is this, and I want the record to be complete on that: that for his own convenience, to suit the purposes of the moment, he will say, "California is my home," or he will say, "Reno is my home." And under those circumstances no Court can really pin him down as to where his home is, and that is what I want to develop here, and that is what this is material to.

Mr. Rosenblatt: I refer your Honor to Matter of Newcombe on that subject, on the right of any person in the United States to choose any domicile for any purpose he desires.

[fol. 365]. The Court: It may be marked, but I am telling you that that statement of his does not influence the Court.

Mr. Winsten: I bow to your Honor's consideration of it, except I would like to have it in evidence, if your Honor please.

Mr. Rosenblatt: I except to your Honor's admitting it.

The Court: The very publication that you offer in evidence, the title itself, and his writing, must of necessity indicate that he is a traveler, and, as he terms it, a vagabond—a vagabond from the standpoint that he goes from place to place, observing what he does and reporting on it and writing on it, and taking pictures, and lecturing on it. That is conceded.

Mr. Winsten: There is a distinction between being a vagabond, with having absolutely no home or domicile at

all, and being a vagabond and having at all times during your travels a permanent place of abode or domicile.

The Court: Would you say that this defendant is the kind of vagabond with no place, no home, or no abode?

Mr. Winsten: I would say so, your Honor, because he has equivocated all the way through his testimony.

The Court: During the marital relationship between these people, your client has testified that they had leased homes in California.

Mr. Winsten: But the Referee has also found the fact, your Honor, that, while he said that he was a California resident from 1945 to October 1, 1952, he was stating [fol. 366] that Reno, Nevada—in his tax returns, that Reno, Nevada, was his residence. He was stating in other places that Reno, Nevada, was his residence.

The Court: Therefore, your very argument indicates that he was not a man without a home. He may have had many homes.

Mr. Winsten: But you can only have one domicile.

The Court: That is the question, what place is his domicile.

Mr. Rosenblatt: I direct your Honor's attention that the questions developed and found before the Referee as to the situation on October 1, 1952, showed very clearly that whatever the changes of residence were, from Nevada to California, or California to Nevada, it certainly was not to New York at any time by either of these parties. The Referee finds that very clearly, and I refer you very specifically to paragraph 17.

The Court: I read it.

Mr. Rosenblatt: Of that report.

The Court: I read it. I'll take it.

(Received in evidence and marked Plaintiff's Exhibit 21:)

Mr. Winsten: Now I am going to ask for a concession to the facts stated in your affidavit. The portion appears on page 54 of the record on appeal.

Mr. Rosenblatt: I am going to concede that what appears in the files of this Court appears in the files of this Court. In the previous action Judge Greenberg made a

decision on February 27th. That's what I said. I took [fol. 367] an appeal on such-and-such a date and——

Mr. Winsten: Will you let me state what I would like to have you concede?

Mr. Rosenblatt: Go ahead.

Mr. Winsten: That in the prior separation action hearings took place before Referee Lazar on December 9, 1952, December 13, 1952, December 15, 1952——

Mr. Rosenblatt: Isn't that in the Referee's report when he held the hearings?

The Court: I have the report right here.

Mr. Winsten: And December 16, 1952. That on February 27, 1953, an order was made by Mr. Justice Rabin dismissing the prior action——

Mr. Rosenblatt: You mean Mr. Justice Greenberg?

Mr. Winsten: Mr. Justice Greenberg, yes; that on March 27, 1953, plaintiff served a notice of appeal from that order.

The Court: Why do you need all of this in the record?

Mr. Winsten: To show the chronology, if your Honor please. The defendant claims that he acquired a residence in Nevada on March 5, 1953, and I want to indicate to this Court that as late as sometime late in the fall, or even in 1954, there were still some proceedings pending in this court or in the Appellate Division.

Mr. Rosenblatt: Freely conceded. I said that long ago in this record.

Mr. Winsten: I just wanted the record to be complete on that.

[fol. 368] And on May 21st there was an order denying the motion for reargument—that is 1953. That on June 22nd, 1953, a second notice of appeal was served by the plaintiff, and on June 30, 1953, a motion was returnable for expenses of an appeal and an injunction made by the plaintiff.

That on July 3rd, 1953, an order was made denying that motion.

That on September 29th, 1953, a motion was made in the Appellate Division for leave to appear as a poor person.

Mr. Rosenblatt: By the plaintiff.

Mr. Winsten: By the plaintiff, yes; and that motion was denied on October 15, 1953, and an appeal was dis-

missed by the Appellate Division for non-prosecution on February 17, 1954.

Now I ask counsel to produce, in accordance with my notice to produce, the original of a letter dated December 6th, 1952, purporting to have been sent by Cornelius Vanderbilt, Jr., the defendant, to Judge John S. Sinai.

Mr. Rosenblatt: I know of no such letter having been mailed, sent, or received by Judge John S. Sinai of Reno, Nevada; and may the record show, as counsel well knows, that Judge John S. Sinai is the defendant's lawyer and has been for many years in the State of Nevada, and that any communications between him and his lawyer are certainly confidential communications.

Mr. Winsten: If your Honor please, in connection with this letter, as a preliminary to my offering it, I would like [fol. 369] to have deemed marked in evidence the following statement contained in Mr. Rosenblatt's memorandum of law, submitted in the trial action for a separation, and it is part of the record in this case.

Mr. Rosenblatt: May it please your Honor, I think I have gone far enough in conceding this, that, or the other thing, and in taking references for indirect testimony through statements and affidavits in the other action.

Mr. Winsten: I am not asking for any concession now.

Mr. Rosenblatt: I certainly say to your Honor now that no matter what I said in any memorandum of law, it would not be binding upon the defendant in this action.

The Court: How do you know what he is going to read? He is reading from a paper on file in this court—is that so, Mr. Winsten?

Mr. Winsten: A paper on file.

The Court: In this action?

Mr. Winsten: In a prior action.

The Court: In connection with the same subject matter?

Mr. Winsten: That is right.

Mr. Rosenblatt: Well, your Honor, a memorandum of law——

The Court: Is it a memorandum or an affidavit?

Mr. Winsten: It is a memorandum, sir, submitted to this Court by an attorney.

Mr. Rosenblatt: What's that got to do with anything?

Mr. Winsten: There certainly should be some responsi-

bility on the part of members of the bar to make correct [fol. 370] statements of fact to the Court.

The Court: We are trying the case now.

Mr. Rosenblatt: And you gave plenty of memoranda, counsel for the plaintiff gave plenty of memoranda to this Court on the question of her domicile on October 1st, 1952, and we did not consider that those statements were in any way entitled to evidentiary value.

The Court: I am going to rule on it. Is there an objection?

Mr. Rosenblatt: There is an objection.

The Court: Objection sustained. We cannot take Mr. Rosenblatt's statement in a memorandum of law as any evidence in this case.

Mr. Winsten: All right; your Honor; exception.

The Court: Can we suspend for five minutes, gentlemen?

(At this point there was a short recess.)

The Court: In connection with the request, that you asked me about my ruling as to the admission of the income tax returns and the offer being made under Section 348 of the Civil Practice Act, I must sustain the objection because I feel that those income tax reports were offered in a hearing involving domicile. They were not offered at that time in connection with any question of the income of the defendant, so that the plaintiff at that hearing did not have the opportunity of cross-examining or inquiring in connection with the income or the other items in the income tax return.

[fol. 371] They were offered at that time only for the purpose of indicating that when the income tax returns were filed, the place of domicile was indicated there as being Reno, Nevada, and for that purpose alone they were received. There was no issue there, there was no trial there, and there was no hearing there in connection with the income of the defendant.

Based on all that, I must sustain the objection.

Mr. Rosenblatt: Now, your Honor, may I make one additional statement to protect the record on behalf of the defendant, and that is that there was cross-examination and inquiry to the details of these tax returns upon the previous hearing; and the statute 348, does not limit the purpose for

which the introduction into evidence is sought of exhibits previously marked in evidence upon a prior proceeding, but merely refers to exhibits upon a prior proceeding.

The Witness: Sir, these were not income tax returns.

Q. Mrs. Vanderbilt, do you recognize this paper?

A. Yes.

Q. When did you first see it?

A. On February, about the 13th of 1953, at 1048 Fifth Avenue.

Q. And where did you see it, particularly in that house?

A. In my husband's room in his papers at 1048 Fifth Avenue.

Mr. Winsten: May I have the paper marked for identification at this time?

(Paper marked Plaintiff's Exhibit 22 for identification.)

[fol. 372] Q. Now, Mrs. Vanderbilt, I show you an affidavit that you made in this Court dated March the 10th, 1953, in a prior separation action, and I direct your attention to page three thereof, and ask you to read it silently.

Mr. Rosenblatt: I object to this proceeding, your Honor. The witness has not needed any refreshing of her recollection.

Mr. Winsten: It is not to refresh her recollection. It is for the purpose of establishing identification, if your Honor please.

The Court: Identification of what?

Mr. Winsten: Of this letter as being referred to in a certain letter.

The Court: By whom?

Mr. Winsten: By her and the defendant.

The Court: Ask her that.

Q. Is that the letter you referred to in your affidavit that you are reading now?

A. Yes.

Mr. Winsten: I ask that the affidavit of Patricia W. Vanderbilt, which is on file in this Court in a prior separation action, and sworn to on March 10, 1953, be deemed marked in evidence.

Mr. Rosenblatt: I object, your Honor, upon the ground that the witness is here——

The Court: Objection sustained.

Mr. Winsten: I should now like to offer in evidence, or have deemed marked in evidence, the affidavit of Cornelius Vanderbilt, sworn to on March 30, 1953, on file in this Court under index number 31632, 1952, in the prior action, and particularly with respect to the following portion, and [fol. 373] with your Honor's permission I will read that portion in lieu of having it deemed marked as an exhibit.

Mr. Rosenblatt: Since there is something being offered in evidence, your Honor, I would like to read it myself.

Mr. Winsten: It is an affidavit of the defendant. I will direct your attention to the portion I am interested in—I withdraw the offer of the entire affidavit if my offer so rests, and I intend to offer only the portion which I intend to read into the record.

Mr. Rosenblatt: Now, I object to reading any portion of this affidavit with respect to this alleged writing of December 6, 1952, upon the ground it is by its own terms addressed by the defendant to his own lawyer, and is therefore a confidential communication.

Mr. Winsten: Well, I have not offered the letter yet. I am only offering a statement made by the defendant in an affidavit on file in this Court, if your Honor please.

Mr. Rosenblatt: That is a method of doing by indirection, your Honor, what cannot be done by direction.

The Court: We don't know what letter it is. I have not seen the letter. I don't know what he is referring to. You are offering a portion of the affidavit of the defendant on file in this case?

Mr. Winsten: Not in this case, your Honor, but in this Court.

Mr. Rosenblatt: May it please your Honor——

[fol. 374] The Court: It may not be of any value, I don't know yet. Let him read it. I don't know what it is yet.

Mr. Winsten: It is paragraph four on page two:

"The plaintiff's charges of fraud are based largely on three letters from which she quotes in her affidavit.

"With respect to the alleged letter to Judge John S. Sinai, dated December 6, 1952, I wish to state that while

I dictated it, I never sent it to Judge Sinai, nor did my secretary, as appears in the affidavit of Judge Sinai annexed hereto and made a part hereof. I withheld mailing it because I intended to make revisions and corrections, as I had dictated it hurriedly, and some of the subject matter about what I wrote was not clear in my own mind."

I now offer in evidence the letter which is now marked Plaintiff's Exhibit 22 for identification.

Mr. Rosenblatt: And I object to it upon the ground that it was intended and is a confidential communication addressed by a client to his attorney.

The Court: From his own statement he never sent it to his attorney and never mailed it to him.

Mr. Rosenblatt: And that there had to be revisions and it was incorrect and so forth. On what basis could your Honor therefore take such a document?

Mr. Winsten: It reflects a statement of mind because it was written by this defendant.

[fol. 375] The Court: Objection overruled.

Mr. Rosenblatt: Now may I examine further with respect to this letter of this witness?

The Court: Show it to counsel.

Mr. Rosenblatt: Oh, I am very familiar with it.

The Court: Let me see it.

Mr. Rosenblatt: I would like the record to show, if it does not already, that this communication was extracted and stolen by the plaintiff from the possessions——

Mr. Winsten: I object to any such statement——

Mr. Rosenblatt: From the possessions of the defendant.

Mr. Winsten: I object to a statement that this paper was stolen.

The Court: I have not any such testimony on the record.

Mr. Rosenblatt: You will have it in about two minutes. I will reserve that for my regular cross-examination, your Honor.

(Received in evidence and marked Plaintiff's Exhibit 22.)

Q. Now, Mrs. Vanderbilt, I show you a paper here and I ask you where did you first see that paper?

A. I saw it at 1048 Fifth Avenue in the middle of February, 1953, at 1048 Fifth Avenue.

Q. In what portion of the house did you see it?

A. In my husband's room, together with his other papers.

Mr. Winsten: I offer that in evidence.

Mr. Rosenblatt: I have no objection, but I reserve the [fol. 376] right to cross-examination with respect to this paper as well.

(Received in evidence and marked Plaintiff's Exhibit 23.)

Mr. Winsten: In this connection at this point I would like to direct your Honor's attention to the portion of this Exhibit 23 which indicates as follows, and I am reading from page 3:

"It was unanimously agreed that it would be in the best interests of the Estate to surrender possession as quickly as possbile"—you agree that it refers to 1048 Fifth Avenue, don't you Mr. Rosenblatt?

Mr. Rosenblatt: The whole paper is in evidence. I don't have to agree on anything.

Mr. Winsten: In connection with the Judge's understanding of this I am going to read further:

"Mr. Vanderbilt stated he had already undertaken to find other quarters, and that as soon as he could find adequate space he would move from the building, and that in the meantime it would be advisable to reduce the number of personnel."

I would also like to mark in evidence notice to produce referred to in my request of Mr. Rosenblatt to produce the original of Exhibit 22 in evidence.

The Court: The defendant himself said that he never mailed it.

Mr. Winsten: I would still like to have the notice to pro- [fol. 377] duce marked anyway, if your Honor please, to complete the record on that.

(Received in evidence and marked Plaintiff's Exhibit 24.)

Q. Now I show you this letter and ask you whether, or rather whom did you get this letter from?

A. From my husband.

Q. When did you get that from him?

A. I would say it is in 1950, sometime in 1950.

Mr. Winsten: I offer in evidence a paragraph of this letter appearing on page 2, bearing No. 4.

Mr. Rosenblatt: This was in evidence before the Referee on the prior hearing?

Mr. Winsten: I believe so.

Mr. Rosenblatt: I have no objection. I have no objection to the whole letter or any part of it.

Mr. Winsten: I am only offering No. 4; I don't want to clutter up the record, and I think the only pertinent portion is the part that I am offering with respect to domicile.

(Received in evidence and marked Plaintiff's Exhibit 25.)

Q. Now, Mrs. Vanderbilt, were you at the home of Esther Gilbert sometime in September or October, 1953?

A. Yes.

Q. Where was that?

A. In Pelham Manor, New York.

Q. Did a telephone conversation take place between Esther Gilbert and the defendant which you overheard?

A. Yes.

[fol. 378] Q. Were you on another extension?

A. Yes.

Mr. Rosenblatt: May it please the Court, wasn't this the subject of previous inquiry?

The Court: What is the purpose of this?

Mr. Winsten: The purpose is with respect to domicile, if your Honor please.

Mr. Rosenblatt: May it please your Honor, there was a question—I will find the place in the record——

The Witness: This is a different conversation.

Mr. Rosenblatt: Where the same conversation was overheard.

Mr. Winsten: This is not the same conversation.

Mr. Rosenblatt: Oh, now there is another one?

Mr. Winsten: Yes, sir.

Mr. Rosenblatt: Oh, thank you. Let us fix when was the first one and when was the second one.

Mr. Winsten: We will do that.

Q. When was the conversation that was had between Esther Gilbert and the defendant that you testified on direct examination?

A. I believe, if I am correct, that was in August, several conversations in August 1953.

Q. Now the conversation I refer to now is one in September or October 1953, is that correct?

A. Yes.

Q. And there was such a conversation?

A. Yes.

Q. Now did the defendant indicate during the course of that conversation where he was at that time?

A. Yes, he said that he was in Connecticut.

[fol. 379] Q. Did you have a conversation directly with the defendant at any time thereafter, and I direct your attention particularly to January 1954.

A. Yes.

Q. And during the course of your conversation with the defendant did he say where he was at that time?

A. Well, I called him and got him in Florida.

Q. And did he in the course of that conversation indicate to you how long he had been in Florida?

A. He said he had been there several months with Mr. Ed Parker.

Q. Now, Mrs. Vanderbilt, let us take the time when the defendant told you that he was not returning in September 1952. At that time did the defendant have more than one place where he received his mail?

A. Yes.

Q. Will you please tell us where the places were to your knowledge that he received his mail?

A. At 1048 Fifth Avenue, at the Ambassador East in Chicago, Illinois, at Box No. 654, Reno, Nevada, and at an address in California.

Q. Is that the Brighton Way address in California or some other address?

A. Well, I didn't know about any Brighton Way address.

Q. Was he receiving mail at the place that you lived at at that time?

A. Yes. And also at the Shoreham Hotel in Washington, D. C.

Q. Now at that time you testified on direct examination that the defendant had bank accounts in various cities, did you not?

A. Yes, he did have bank accounts all over.

Q. And did he have a bank account in Chicago?

A. Yes.

Q. Did he——

Mr. Rosenblatt: May it please your Honor, is this prior to or after October 1952?

[fol. 380] The Court: September 1952, he said.

Mr. Winsten: That's right.

Mr. Rosenblatt: Then, may it please your Honor, I think that the Referee's report, confirmed by this Court, is determinative on the question of their domicile as of October 1, 1952, and all of these facts were adduced and are at length referred to in the same report of the Referee.

The Witness: No, I don't think so.

Mr. Rosenblatt: Where he got mail, and he had bank accounts, all of those things.

Mr. Winsten: If your Honor please, it is my intention to develop at this time, as your Honor can very well see, facts to indicate that at that time and at this other time the defendant has stage settings in various cities——

The Court: They don't deny that.

Mr. Winsten: With a mailing address in Chicago, Washington, New York, California, Reno, a bank account in several of those cities——

The Court: That is all conceded, I think.

Mr. Rosenblatt: And in London, you forgot London, and Paris.

The Court: He is a vagabond, is that right? Counsel concedes he is a vagabond?

Mr. Rosenblatt: That's right.

The Court: He travels and he lectures and he goes from place to place, not only in this country but in Europe as well, and maybe in other parts of the world—is that correct?

Mr. Winsten: Yes, your Honor.

Mr. Rosenblatt: That is correct.

[fol. 381] Mr. Winsten: Now in connection with the letter of December 6th, I am attempting to prove and develop that there was a definite plan and to perpetrate a fraud in this court.

Mr. Winsten: In 1952, because when he was testifying before this Referee that he was a resident of California, he was making plans to establish a quiet domicile in Reno for the purpose of getting a divorce and perpetrating a fraud on this plaintiff. In fact——

Mr. Rosenblatt: Now, may it please the Court, I have asked you many times to take notice and I think you have already deemed in evidence, the order of Mr. Justice Rabin of July 3, 1953, where all of these points were made, and this same paper of December 6, 1952, was before Mr. Justice Rabin, as it had been previously before Mr. Justice Greenberg on a motion to reargue. This is nothing new.

The Court: Let's come along, gentlemen.

Q. Did the defendant have property in storage in more than one city?

A. Yes.

Q. Will you please tell us where he had property?

Mr. Rosenblatt: May it please the Court, I admit that he had property in lots of places.

Mr. Winsten: Will counsel concede that he had property, personal property, in Washington, D. C.?

Mr. Rosenblatt: Certainly, and in Chicago and in Florida [fol. 382] and in California and Nevada, certainly.

Mr. Winsten: And that he had property stored in warehouses in some of those cities?

Mr. Rosenblatt: Certainly.

Mr. Winsten: That he had suitcase in a hotel, in the Shoreham Hotel in Washington, D. C.?

Mr. Rosenblatt: If you say so, I will even agree to that.

The Court: Let me ask you this question: Is it your point, or will it be your point, that this man never had a residence in any state or any place?

Mr. Winsten: I say this,——

The Court: He was never domiciled in any place in the country?

Mr. Winsten: I say this to your Honor——

The Court: I mean is that the point you are going to make?

Mr. Winsten: In effect, it is.

The Court: And that he could never establish one?

Mr. Winsten: No; that he never established an honest domicile. He only established one to suit his convenience at the moment, and he shifted from place to place, as the Referee himself has found, and he has continued to shift from place to place, and he has put himself in a dilemma which he cannot expect this Court to extricate him from.

The Court: If he shifted from place to place, there had to come a time, and the time is up to the defendant, to decide when he had to seek a place that he called his domicile. [fol. 383] I mean, we could not prohibit or prevent him from once in his lifetime establishing a domicile. If he did in this case, that's the question; but the fact that he traveled from place to place did not prevent him or bar him from establishing a domicile at some time or some place.

Mr. Winsten: I make no such concession, your Honor.

The Court: So, keeping in mind what counsel has said, that this man did travel from place to place, and, as he termed it, he was a vagabond, he did have furniture and personal property in many cities in this country and outside this country—that has already all been established. Now let us try and expedite this.

Mr. Winsten: I am trying to do that, Judge. I am almost finished with what I am trying to get across, and it is very briefly this: as you can see from the last exhibit, even at the time when he claimed to a California resident, he was talking to lawyers and saying, "Should I change my residence to California, wouldn't it be a good thing to outlaw claims?"

He claimed that he was living in California and he writes to his wife and he says, they thought it would be a good idea to establish a residence in California to outlaw claims.

The Court: Where was he living at that time? Where do you say he was living at that time?

Mr. Winsten: Mrs. Vanderbilt says that he had an apartment in his mother's house, which was his headquarters.

[fol. 384] He claims that he lived in California, and here he was writing to his wife that he was deciding to change his domicile to California in 1950. So, where was his domicile?

My friend here says that the intent to establish a domicile must be present too in order that a domicile be established, and these things indicate a lack of such intent to establish a permanent residence.

That's all.

Mr. Rosenblatt: Since plaintiff has referred to the affidavit of the defendant of the 18th of November, 1952, and has read from a part of said affidavit, I ask that the entire affidavit be deemed marked in evidence on behalf of the defendant.

(Received in evidence and deemed marked Defendant's Exhibit O.)

Mr. Winsten: I would like to note my objection to the offer of the balance of the affidavit at this time on the ground that it is a self-serving declaration since the defendant is not here to be cross-examined.

Mr. Rosenblatt: You cannot read from a part of a paper and keep out the balance of it, so far as I know.

Now, with reference to this paper of December 6, 1952, Plaintiff's Exhibit 22, first, your Honor, I desire to read into this record the statements made in the same paragraph first read by my adversary, and completing the statements in the paragraph.

Mr. Winsten: I would like to note my same objection to reading any other portions in the affidavit on the ground [fol. 385] that the defendant is not here for cross-examination.

The Court: This is part of the same paragraph. You cannot read a sentence taking it out of context. It may have a different meaning when you finish reading it.

Mr. Winsten: I would like to have my objection noted for the record.

The Court: You have.

Mr. Rosenblatt: Your Honor will recall the statement made by the defendant, "I never sent it to Judge Sinai nor did my secretary, as appears in the affidavit of Judge Sinai

annexed hereto and made a part hereof. I withheld mailing it because I intended to make revisions and corrections, as I had dictated it hurriedly, and some of the subject matter about which I wrote was not clear in my own mind. I wanted my communication to Judge Sinai to represent a clear and complete report of the matters involved and I felt that before this could be accomplished I would have to consider the letter anew and make necessary corrections and revisions. However, there is nothing in said letter which contradicts or differs from the testimony and evidence adduced at the hearing of both parties, and the Referee as to any material fact and which is contained in 835 pages of testimony and in voluminous plaintiff's and defendant's exhibits, the authenticity of which the plaintiff cannot dispute. A critical reading of said letter fails to disclose any evidence whatever of fraud in these proceedings. The plaintiff, I repeat, persists in overlooking the real issue before the Referee, to wit, the residence [fol. 386] of both parties upon and prior to October 1, 1952. There is not a single statement in that letter respecting any contemplated future action or otherwise, which can in any way reflect on the propriety and honesty of my conduct in these proceedings.

"In this connection, the record clearly shows that I willingly submitted to a full and searching cross-examination at the hearings and gave open and honest answers to all questions put to me, with no attempt whatever to withhold or suppress any material or relevant fact.

"Moreover, in numerous instances during my examination, I admitted receipt of many items of documentary evidence of the same kind as plaintiff now seeks to present to the Court, without any attempt at equivocation."

Mr. Winsten: I move to strike out that portion, if your Honor please as purely self-serving. It has no connection with any of the portions that I read, and the defendant is not here for cross-examination.

Mr. Rosenblatt: May it please your Honor——

The Court: It has no bearing in the issue here.

Mr. Rosenblatt: It is the complete paragraph and shows the intent with respect to the formulation of this paper which you have received in evidence.

The Court: I will evaluate it in determining the final issue.

Mr. Rosenblatt: Now may it please the Court, if you don't already know it, may the record show that in this [fol. 387] very proceeding counsel for the plaintiff was given an opportunity by order of this Court to examine the defendant and never took advantage of that order's opportunity.

Mr. Winsten: May the record also show that the opportunity was given to this plaintiff to examine this defendant with respect to his domiciliary intention, was by written interrogatories. Imagine, your Honor, written interrogatories——

The Court: You have made your statement. Let's come along.

Recross-examination.

By Mr. Rosenblatt:

Q. Now, Mrs. Vanderbilt——

Mr. Winsten: Just a moment. I would like to complete my statement if you just don't mind. Under the order of Judge Benvenga, Judge Benvenga said that I could have an oral examination, and if your Honor will recall at the opening of the trial I made such an application with the condition that I establish that the defendant is in this state or in this city as a condition for my conducting an oral examination.

The Court: And that you have not established, so how could it be ordered?

Mr. Winsten: But, you see, your Honor, that was my impossible position. So counsel now says that I was given an opportunity to examine this defendant.

Mr. Rosenblatt: That's what the Court gave him, your Honor.

The Court: Let's come along.

[fol. 388] Q. Mrs. Vanderbilt, you say that you got this paper from the defendant's room in 1048 Fifth Avenue on the 12th or 13th of February, 1953, is that right?

A. Which paper?

Q. The paper of December 6th, 1952, addressed to John Sinai?

A. Yes.

Q. Did you remove that paper from the premises at 1048 Fifth Avenue?

A. That's right.

Q. Is this one of the papers you secreted on your person, as you have testified?

A. I took them out with me, yes.

The Court: I cannot hear you, madam.

The Witness: I say I took them out with me when I left the next day.

Q. Did that paper belong to you, madam?

A. Yes. At that point it did.

Q. And what was your evidence of ownership of that paper? Had you written it?

A. Not only possession, but it concerned me and it was written by my husband.

Q. Did you own that piece of paper?

A. I certainly did.

Q. And other papers that you took out of there you owned on the same basis, that they concerned you, is that right?

A. They concerned me, they were writings of my husband's, or they were possessions of my husband's.

Q. Did you have authority from anybody to remove the paper from the premises?

A. I have authority from all the laws of the land that I know of on this business.

Q. Then why did you——

A. When people are married, what belongs to me or what belongs to him, that's supposed to be——

[fol. 389] Q. What, madam, prompted you, then, to secrete them on your person? Why didn't you carry them out openly?

A. Because you had your gang outside the door waiting to come in to remove all the papers that were all over the room.

Q. You are now talking about the representatives of the estate?

A. I am talking about my husband's representatives.

Q. And there were no representatives of the estate there?

A. My husband is part of the estate.

Q. Weren't there lawyers from the estate there?

A. I don't know for sure.

Q. You did not see any lawyers from the estate?

A. I don't know for sure.

Q. You would not say?

A. I was not introduced to these people.

Q. But on the theory that you had a right to anything he owned, you walked out with this paper; is that right?

A. Certainly.

Q. Did you have anything to do with the meeting of the executors of the Grace Vanderbilt estate?

A. What do you mean, did I have anything to do with it?

Q. Did you attend the meeting?

A. No.

Q. Do you know who wrote that paper?

A. I have no idea. It was in my husband's personal papers.

Q. Do you know whether it was corrected or not?

A. No. This is the paper that I took.

Q. Did you consider that they belonged to you?

A. Certainly. It says here that they are all agreeing that they are going to put his assets away.

Q. And that belongs to you, his assets; is that right?

A. Yes. He is always trying to hide everything.

[fol. 390] Q. Do you claim that his assets belong to you, madam?

A. He is my husband.

Q. Madam, I am asking you if that paper belonged to you in the middle of February of 1953?

A. When I took it in my hand it belonged to me.

Q. I see. God help my papers that——

Mr. Winsten: Now I move to strike out counsel's remark, if your Honor please.

The Court: Strike it out.

Mr. Winsten: I don't think the witness is interested in your papers, Mr. Rosenblatt.

The Court: Strike it out.

Mr. Rosenblatt: May it please the Court, I move to

strike Exhibit 23 of the plaintiff and renew my previous objection, on the ground that it has now been established that this witness does not know to whom this paper belonged, nor——.

The Witness: I think I have said it belonged to my husband. It was in his personal papers, with all kinds of other papers.

Q. Did that make it belong to him?

A. Certainly.

Q. Do you know who drew this paper?

A. It says something about it on there.

Q. Did he prepare this paper?

A. He was present at this meeting.

Q. You only know that because it is recorded on the front page in typewriting.

A. That's right and I firmly believe he was there, and you were there.

Mr. Winsten: This was received without objection by counsel.

The Court: That's what I was about to say.

[fol. 391] Mr. Rosenblatt: On that point, when it was received without objection, I took it on the basis that this witness had some participation in either the preparation or had something to do with this paper.

The Witness: Oh, no. He was there. He is indicated to be there. You are indicated to be there at this meeting. You know whether this meeting took place.

Q. I never drew this paper. I don't know who drew it either.

A. Your name is on it.

Q. The fact they put my name on the papers does not prove anything.

A. You can deny whether you were there or not, as far as I know.

Mr. Rosenblatt: What I am saying, your Honor, is that in so far as anything attributed to the defendant is concerned, it is the sheerest hearsay.

The Witness: There is no question that it took place.

The Court: Objection sustained.

Mr. Winsten: Exception.

Q. When you reached the defendant in August 1953, I think you told his Honor from Mrs. Gilbert's house that you telephoned or she had telephoned to him at Reno, Nevada, is that correct?

A. Yes.

Q. And that you did not know the city that she reached him in, is that right?

A. Well, she has the phone number.

Q. Did you hear her place the call?

A. I cannot recall all of that, Mr. Rosenblatt. I knew it was in Nevada.

[fol. 392] Q. And she reached him in Nevada?

A. That's right.

Q. And the next time that she called was when, do you say?

A. I did not say she called.

There were several conversations in there in August, not only one, that I could recall, back and forth.

Q. And were they from Nevada to Pelham Manor, is that it?

A. Well, I don't know about all that, being from Nevada. I don't know about all of them being from Nevada. I know that she called him in Nevada and we talked to him, and then he called back a couple of times—I don't know—several conversations with him.

Q. The question I am going to ask you now is whether you reached him on any telephone at any time after August 1953 in New York?

A. After August of 1953?

Q. Yes.

A. No, I don't think so; I don't know.

Mr. Rosenblatt: That's all.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Winsten: There is one thing I would like to clear up, your Honor. I attempted to discover from Mr. Weinberger yesterday whether or not what happened to that $300 in March or April 1953. He was not able to find—he stated to Mr. Raskin, who is my associate here, that he did receive a $300 check from Mr. Rosenblatt. My client has no recollection of having received that from Mr. Wein-

berger. So, I wanted this record to be clear on that question, that she may or may not have received that $300; but there has been no definite ascertainment of that fact on this point.

The Court: Do you rest now?

Mr. Rosenblatt: Just a minute.

[fol. 393] Mr. Winsten: And also that Mr. Rosenblatt's check was payable to Mr. Weinberger. That's what I found out from him.

Mr. Rosenblatt: As attorney.

The Court: As attorney, yes.

Mr. Rosenblatt: In this connection, your Honor, I don't need Mr. Weinberger or anybody else, but the affidavit of Patricia Vanderbilt sworn to on the 24th day of June, 1953.

The Court: You read that yesterday.

Mr. Rosenblatt: That's right.

The Court: She explained it yesterday.

The Witness: Sir, he says it is his check to Mr. Weinberger. If he cashed it, where is it?

Mr. Rosenblatt: Why don't you ask Mr. Weinberger?

The Witness: That's what we are trying to find out. You are the one who is accusing me of having gotten it.

Mr. Rosenblatt: I did not accuse you. I want to make sure that you did get it.

The Witness: Well you are saying that I got it.

Mr. Winsten: Have you any recollection of having gotten this check?

The Witness: No.

The Court: We went over this yesterday.

Mr. Winsten: I wanted to show the Court that I made a definite attempt to ascertain the facts.

The Court: All right. Anything else?

Mr. Winsten: That's all from this witness, if your Honor please.

The Court: Step down.

[fol. 394] Mr. Winsten: Now I would like to approach the bench.

(Conference between the Court and counsel at the bench.)

Mr. Rosenblatt: In respect of Plaintiff's Exhibit 18 for identification, concerning which a concession by defendant's counsel, I am agreeable that the record show that

the report referred to as of April 14, 1943, showed the incapacity of Major Cornelius Vanderbilt, Jr. for active service, and that the causes of the incapacity are: (1) Angina pectoris, moderate, due to coronary-arteriosclerosis. (2) Psycho-neurosis, mixed typed, conversion and anxiety features, severe.

Mr. Winsten: Now, I would like to get a clear position on the record with respect to the proof of the defendant's wealth and assets and his financial ability.

As I indicated to your Honor yesterday, I had been precluded from an examination before trial for the reasons of law indicated that on that particular time we were not entitled to one under the prevailing rules of this department until we had established our right to any financial support from the defendant.

Therefore I am in this dilemma. I have not been able to examine the defendant, and I should like to reserve my right with respect to additional proof after such an examination of the defendant has been had, and I ask the defendant's counsel today whether the defendant is in this state? [fol. 395] Mr. Rosenblatt: I didn't know that I was going to be called upon as a witness, your Honor.

Mr. Winsten: I am asking him for a statement, not as a sworn statement.

Mr. Rosenblatt: To the best of my knowledge, he certainly is not in the State of New York.

Mr. Winsten: All right, then, with that reservation, if the Court please, and the reservation with respect to my affidavit with respent to my services and the right to Mr. Rosenblatt to cross-examine me, if he should deem it necessary, on the question of additional counsel fee under the order of Judge Rabin; I believe, of July 6, that is the plaintiff's case.

Mr. Rosenblatt: I do not accept the reservation with respect to additional evidence in connection with the financial status, and so forth.

I take it that under this Section 1170-B, if the application is pursued thereunder and over my objection, either party may at any time apply for any modification, or whatever it may be, in the order which might be made by the Court. That's what the section says.

The Court: I will reserve decision on his request. If I

deem fit or find it necessary to permit him to examine the defendant on the question of his financial conditions, I may rule at that time. But at this time I am reserving decision on that request.

Mr. Rosenblatt: Do I understand that the plaintiff has rested?

The Court: With that exception.

[fol. 396] Mr. Rosenblatt: Is that right?

Mr. Winsten: That's right, and the exception with respect to the proof of my services; and at this time I would like to direct the Court's attention to Judge Rabin's order, that this Court is empowered to examine the question of alimony retroactively as of the date of the commencement of this action.

Mr. Rosenblatt: That is, providing the Court had jurisdiction of the separation action itself and was not dismissed.

Mr. Winsten: Naturally.

Mr. Rosenblatt: Now may it please the Court, I move——

The Court: Is this on the question of domicile? You made your motions yesterday in connection with the main case.

Mr. Rosenblatt: But now I have to remake them in order to protect my record, because the case was opened up yesterday and the plaintiff was allowed to resume the stand. Your Honor set aside the resting of the plaintiff.

I believe my motions are in the record. I would like to repeat now my motions at the conclusion of the plaintiff's case.

The Court: Suppose you make a statement that you repeat the motions you made heretofore at the end of the plaintiff's case yesterday unless you want to elaborate on them.

MOTIONS TO DISMISS AND RULINGS THEREON

Mr. Rosenblatt: Very good, your Honor. I do so move upon all the grounds set forth in the motion to dismiss made yesterday, and reincorporate them here, and make the additional point that the parties hereto were not mar-

[fol. 397] ried in New York State, and never were domiciled in New York State as husband and wife, and New

York has no lawful interest in the subject matter of defendant's Nevada divorce.

The Court: Decision reserved. Now, what about domicile? Are you going to make any motion on the other issue now? What about the other issue?

Mr. Rosenblatt: My motion is based entirely upon the validity of the Nevada decree which is before you, and upon the basis that that Nevada decree has not been impeached nor its validity impaired; and that upon the plaintiff's own case, the existence of that decree being entitled to full faith and credit under the Constitution of the United States, requires a dismissal of the plaintiff's case.

Mr. Winsten: It is my position, if your Honor please, with respect to that issue, that the proof adduced by the plaintiff imposes a burden upon the defendant of coming forward with further evidence concerning the bona fides of his Nevada residence and domicile upon which the Nevada decree rests.

Now if your Honor will also recall, we have not been afforded an opportunity to examine this defendant with respect to those matters which are peculiarly within his own knowledge, the question of dimiciliary intent is something that could only be ascertained from the defendant by an oral examination.

The Court: Here you are attacking a Nevada decree. You have the burden of attacking this successfully.

[fol. 398] Mr. Winston: We have the burden of proof, true.

The Court: The defendant does not have to come forward at all; and, as I stated yesterday, and I am repeating again—and I assume that is the understanding, and if not, I want the record to be cleared on that point—that all that the defendant has done here is to offer what is supposed to be—and I take it that is what it is, a properly authenticated Nevada decree divorcing this defendant from the plaintiff in Nevada.

Mr. Rosenblatt: That's right.

The Court: You are attacking that decree, and the burden is upon you.

Mr. Winsten: Yes, your Honor. This is an ex parte decree, if your Honor please, based on constructive service.

The decisions of the United States Supreme Court which have been submitted to your Honor, and by the Court of Appeals in this State, indicate, and there is no question about that, that when the question of the bona fides of the domicile that underlies a foreign decree of divorce based upon constructive service, arises, this Court is empowered to make de novo inquiry into the bona fides of the domicile of the defendant in this action or of the plaintiff in the foreign action.

The Court: And that is what we have been doing here.

Mr. Winsten: Now, if your Honor please, examining the question further, there is a distinction between the ultimate burden of proof and the responsibility and the burden of going forward with additional proof. We have established [fol. 399] certain facts which I believe imposes upon the defendant not the burden of proof, but shifting, shifting the burden to the defendant of coming forward with additional proof in order to prove to the satisfaction of this Court that he had a bona fide domicile, and to rebut the testimony adduced on behalf of the plaintiff which indicated that his domicile in Nevada is subject to doubt.

There is a distinction, your Honor, between the burden of proof in the ultimate and the shifting burden of coming forward with additional proof.

Mr. Rosenblatt: May I be heard, your Honor?

The Court: Yes.

Mr. Rosenblatt: Long ago, in Perara vs. Perara, First Department, the Court held that it is no longer possible to assert lack of jurisdiction in the foreign court as a matter of law, because of lack of matrimonial domicile; but a non-migratory spouse may not assume the affirmative burden of a factual demonstration of its invalidity in a collateral attack upon the foreign decree of divorce in our courts.

And the Court of Appeals in Garvan vs. Garvan, 302 New York, held that the wife must bear the heavy burden —that is the language used—of striking down the prima facie effect of the foreign court's findings of residence.

The Supreme Court case of William v. North Carolina, 325 U. S., says, the burden of undermining the verity which the Nevada decrees import, rests heavily upon [fol. 400] the assailant.

Now, may it please your Honor, I respectfully submit that there has not been one single iota of evidence, of credible evidence, offered in this court to rebut the prima facie presumption of the validity of the Nevada decree in all of its respects; and that the burden of proof has in no wise been sustained by any credible evidence in any way attacking the validity of the Nevada decree.

There are other problems in this case, I grant you that; but in so far as the discharge of her burden of proof against the validity of the Nevada decree is concerned, I maintain the defendant is entitled to a dismissal of her case for failure to affirmatively attack and bear the burden of showing any invalidity in that decree which is entitled to full force and credit in this court.

Mr. Winsten: I would just like to make one further statement, if your Honor please, in that connection.

We have demonstrated conclusively, there is no question about that, that in this court in 1952, and in this court in February 1953, this Court found that the defendant was a domiciliary of the State of California.

Now, there is also a legion of cases to the effect that where one claims a change in a domicile, there is a presumption of continuance of such domicile; and that where one claims a change of domicile, as this defendant has claimed here, I think the Court found on February 27, 1953, that he was a resident of the State of California, that he [fol. 401] intended to make California his permanent residence, and that on March 5, 1953, a few days later, he certainly went secretly to Nevada in order to establish a Nevada domicile.

Now, your Honor, you have a presumption in favor of the plaintiff in that respect under the law, that a domicile once shown to have been established—and it was established by a judgment or order of this court—once a domicile is shown to have been established, it is presumed to continue; and the burden is upon he who claims a change of domicile, to prove to the satisfaction of the Court that such a change was made.

The Court: What about the findings by the Nevada court to the effect that he has established his domicile in Nevada in entertaining the divorce case of the defendant against the plaintiff there, and thereby and thereafter rendering

judgment based on the domicile that he claims that he elected at that time?

I am just answering your argument, counsel. You say once a domicile is established, the presumption is it continues. So that the defendant in this case presents to this Court a Nevada decree based on a domicile that he said he established in March 1953, so that there is a change.

Mr. Winsten: But with this reservation, your Honor——

The Court: You want to know whether it is bona fide.

Mr. Winsten: The Supreme Court of the United States held that that Nevada decree is entitled to full force and [fol. 402] credit except that this Court is not bound to any finding or by any finding which was made on jurisdiction, so that it is an open question in this court. He does not come to this court with a presumption of validity of this domicile. The Supreme Court decisions say that it is a de novo question.

The Court: He comes here with the presumption of validity of domicile in Nevada. Suppose there would be no Nevada decree. It is up to you to establish that the decree is not a valid one because in so far as we are concerned there was not a bona fide domicile established at the time.

Mr. Winsten: The Supreme Court decisions clearly hold that this Court has a right to make an independent investigation.

The Court: And that's what we did in this case.

Mr. Winsten: An independent investigation does not carry with it any presumption of domicile, because that is an open question when it gets to this Court, and this Court has a right to determine domicile, as it is determined under the laws of this State, and not under the laws of Nevada.

The Court: But the burden still rests upon you that it was not a domicile, is that right?

Mr. Winsten: Yes, the burden itself; but we have a presumption of continuance.

The Court: All right, gentlemen, we will suspend at this time with this question anyway.

Do you want to continue with the defense in so far as [fol. 403] the other proposition is concerned?

Mr. Rosenblatt: If you want me to, I will.

The Court: We will take a five-minute recess anyway.

(At this point there was a short recess.)

(After recess the Court declared a luncheon recess until 2:00 P. M.)

Afternoon Session

The Court: In so far as the record indicates at this time, there was a motion made at the end of the plaintiff's case, is that correct?

Mr. Rosenblatt: That's right, sir.

The Court: I reserved decision on that motion?

Mr. Rosenblatt: That's right, sir.

The Court: However, I am asking you at this time whether you have any further proof that you want to offer in connection with the defense of the validity of the Nevada decree and the domicile question. If you have, I would like to take it at this time.

Mr. Rosenblatt: Very well, your Honor.

Mr. Winsten: Before that is done, Exhibit 23 in evidence, to which your Honor sustained an objection after it was marked, I would like to have it marked for identification.

The Court: Mark it for identification.

(Paper marked Plaintiff's Exhibit 23 for identification.)

[fol. 404] Mr. Winsten: And I would also like to have deemed marked in evidence the order of Judge Rabin bearing date July 15, 1954, made in this action, which order relates to temporary alimony and counsel fees as distinguished from another order of the same date.

Mr. Rosenblatt: I have no objection.

The Court: If there is no objection, it may be marked or it may be deemed marked.

(Received in evidence and deemed marked Plaintiff's Exhibit 26.)

Mr. Rosenblatt: May it please the Court, I offer in evidence a duly exemplified copy from the officer having the legal custody of the record in the office of the Registrar of Voters in and for the County of Washoe, in the State of

Nevada, containing an affidavit of registration for voting by the defendant, Cornelius Vanderbilt, Jr.

Mr. Winsten: I understand it, if your Honor please, that this purports to be a complete registration of the defendant's registrations in the State of Nevada. If it is being offered as a complete registration record—because it goes back to some prior years, back as far as 1928—I object to it on the ground that it does not constitute a complete record of his voting registration because it appears elsewhere in the proceedings in the first action that there was also a voting registration for the year 1948 which was omitted from this record.

Mr. Rosenblatt: May it please the Court, I have given you what has come as a complete record from the State of Nevada.

[fol. 405] The Court: Objection overruled. Mark it in evidence.

Mr. Winsten: Exception.

(Received in evidence and marked Defendant's Exhibit P.)

Mr. Rosenblatt: May the record show that the last affidavit of registration was made from No. 2305 Arlington Avenue, of Washoe County, State of Nevada, and subscribed on the 9th day of November, 1953.

Now, may it please the Court, I offer in evidence a duly exemplified record from the officer having legal custody of the records in the office of the Registrar of Voters in and for the County of Washoe, State of Nevada, showing the registration and voting record of Cornelius Vanderbilt, Jr., in general elections in the County of Washoe, State of Nevada, which is set forth together with a statement of the requirements under seal duly exemplified with respect to the necessity for registration and re-registration.

(Received in evidence and marked Defendant's Exhibit Q.)

Mr. Rosenblatt: Now, may the record show, your Honor, that the voting record of Cornelius Vanderbilt shows voting from this certificate in the general elections in Nevada in 1928, 1932, 1934, 1936, 1938, 1940, 1944, 1948, and in 1954, from Reno, Nevada.

Now, may it please the Court, I offer in evidence a duly exemplified copy of the records on file in the office of the Public Service Commission in charge of drivers' License [fol. 406] Division, in the State of Nevada, duly exemplified at Carson City, Nevada, the capital of the state and showing the registrations for vehicles in the State of Nevada by Mr. Vanderbilt.

Mr. Winsten: I object to the introduction of this exhibit in evidence on the ground that it appears that several things do not appear to be clear and they seem to be obliterated on it.

The Court: Objection overruled.

Mr. Winsten: Exception.

(Received in evidence and marked Defendant's Exhibit R.)

Mr. Rosenblatt: May the record show from Defendant's Exhibit R that the last statement contained therein with respect to renewal of an operator's license by Cornelius Vanderbilt, Jr., was signed and filed on the 28th day of April, 1953.

Now, may it please the Court, I offer in evidence a duly exemplified record from the records of the Auditor and Recorder of Washoe County, Nevada, of the payment of personal property taxes by C. Cornelius Vanderbilt and a Mrs. Cornelius Vanderbilt, who I state on the record is not this plaintiff in this case, and for the years from 1928, including January of 1948.

(Received in evidence and marked Defendant's Exhibit S.)

Mr. Rosenblatt: May it please the Court, I offer in evidence but propose to restrict the reading from the same to a specific passage, a book entitled "Reno", pub- [fol. 407] lished by Macaulay, written by Cornelius Vanderbilt, Jr., bearing notice of United States Copyright, 1929, and I will ask the Court to receive the dedication page of such copyrighted work.

Mr. Winsten: That is objected to, if your Honor pleases, as hearsay and not binding on the plaintiff in this action.

Mr. Rosenblatt: Would your Honor accept my memo-

randum, please with respect to the introduction of this book, and another one to come, and the United States law applicable, and the New York law applicable?

The Court: I will reserve decision on that. Mark it for identification.

(Marked Defendant's Exhibit T for identification.)

Mr. Rosenblatt: And does your Honor make the same ruling with respect to a book entitled "Farewell to Fifth Avenue" by Cornelius Vanderbilt, Jr., published by Gollantz, in London, in 1935, and the part specifically wished to be in evidence therefrom, a statement at the bottom of page 204, actually the two lines on the bottom of page 204.

The Court: Let me say about that 1935 book, that is so remote even though he filed as the law required, based on your memorandum that you gave me, it is so remote, he could have changed the residence of that application so many times after that. We are talking here about 1953.

Mr. Rosenblatt: What I am trying to do, your Honor, you see the first book was published in 1929, and I wanted to get in the page of the dedication.

[fol. 408] The Court: It is too remote, Mr. Rosenblatt.

Mr. Rosenblatt: Very good, your Honor. I ask that it be marked for identification.

Mr. Winsten: You are not offering it, are you, Mr. Rosenblatt?

Mr. Rosenblatt: I did offer it and your objection was sustained, as I understand it, your Honor, and you ordered it marked for identification.

The Court: Mark it for identification.

(Marked Defendant's Exhibit U for identification.)

Mr. Rosenblatt: I think your Honor should understand also that the purpose of my offer for these records going back to 1928 was to show that although Mr. Vanderbilt may be called and considered a vagabond—I think the expression was this morning that nevertheless insofar as his domicile is concerned the home of this defendant was consistently from 1928 to 1948 in Nevada.

The Court: But we are not trying him in 1938 or 1925. The problem here that we have to determine is his domicile

in and around 1953 when he says he established his residence to comply with the law of Nevada upon which this decree was entered.

Mr. Rosenblatt: That's right; and your Honor will bear in mind the cases which I cited which say how much easier it is to establish the return to a former domicile than to a new domicile.

[fol. 409] Wyatt L. Harmon, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

(The witness states he resides at No. 820 Arlington Avenue, Reno, Nevada.)

Direct Examination.

By Mr. Rosenblatt:

Q. Mr. Harmon, are you a resident of Reno, Nevada?
A. Yes.
Q. For how long?
A. Approximately 29 years.
Q. Do you have a wife?
A. Yes.
Q. A family?
A. No.
Q. Does your wife live in Nevada?
A. Yes.
Q. And when did you first meet Cornelius Vanderbilt, Jr.?
A. To the best of my recollection, in 1929.
Q. Where?
A. In Reno, Nevada, at a nightclub.
Q. And did you see him thereafter?
A. Frequently.
Q. And did there come a time when your acquaintance became much closer?
A. Yes.
Q. Before I get to that, will you tell his Honor whether you ever held any positions of public office?
A. Not elective; appointive with the government.
Q. Would you state what they are or were?
A. I was Assistant Administrator and Acting Admin-

istrator of the Federal Emergency Relief Administration for the State of Nevada, in the early years of 1930.

Q. Anything else?

A. And I was also Acting Project Manager to the Soil Conservation Service for the Department of Agriculture in 1935—1936 and 1937.

Q. What was your occupation after 1937?

A. In 1938, I resigned from government work and went into the labor movement.

[fol. 410] Q. In what capacity?

A. As Business Representative for one of the American Federation of Labor organizations.

Q. In Nevada?

A. Yes.

Q. Did you know Mr. Vanderbilt before 1940 very well?

A. Yes. We began to get better acquainted in the latter part of 1938.

Q. Did you see a great deal of him?

A. Yes.

Q. Do you know where he was living then?

A. To the best of my recollection he was living—I believe the address was 1307 South Virginia Street, Reno, Nevada.

Mr. Winsten: What year is this?

The Witness: I believe that was at the end of 1938.

Q. And did he have any business or occupation at that time that you know of?

A. He was a writer and a columnist.

Q. And do you know whether he had any office?

A. I believe he maintained his office at his home.

Q. Did you visit the home?

Mr. Winsten: We are interested in the validity of the domicile beginning in 1953, your Honor.

Q. I want to know whether you visited his home?

A. Yes.

Mr. Winsten: I object to this evidence and move to strike it out, anything with relation to 1938.

The Court: Go ahead, Mr. Rosenblatt, what did you want to say?

[fol 411] Q. Following the year 1948, did you see either Mr. or Mrs. Vanderbilt?

A. Yes, I saw——

Mrs. Winsten: I object to anything prior to 1953, if your Honor pleases.

The Court: Objection overruled.

Mr. Winsten: Exception.

A. (Continuing) Yes, I saw Mr. Vanderbilt a number of times and I saw Mrs. Vanderbilt first in Beverly Hills in 1950.

Q. Did you see Mrs. Vanderbilt thereafter in Beverly Hills?

A. Yes, I saw her again I believe in January of 1951 and again in October of 1952.

Q. Now, where did you see Mrs. Vanderbilt in October of 1952?

A. At the house.

Mr. Winsten: May I have my objection noted, if your Honor please, with respect to all of these questions so that I don't have to repeat them on the ground that anything prior to March 5, 1953, the date on which the defendant claims to have established his Nevada residence, is incompetent, irrelevant, and immaterial to the issues being tried here. Will my objection be preserved, if your Honor please?

The Court: What about that, Counselor? He is only interested in what happened after he established the alleged residence?

Mr. Rosenblatt: You recall, your Honor, the testimony given voluminously throughout by the plaintiff in connection with her allegations, and I think that I have a right to show the situation of the parties before and after March 1953. If your Honor wants to rule, however, I will restrict [fol. 412] myself to the period commencing March 5, 1953. Do I so understand?

The Court: Yes.

Mr. Rosenblatt: Very well.

Q. Now, in the year 1953, I specifically bring you to the date of March 5, did you meet, see or speak to Mr. Vanderbilt on the 5th day of March, 1953?

A. Yes.

Q. Where?

A. At the railroad station, the Southern Pacific Railroad station, in Reno, Nevada.

Q. How did you happen to be at the Southern Pacific Railroad station, in Reno, Nevada, on March 5th, 1953?

A. He had called me from Chicago, I believe, and said that he was arriving that morning.

Q. And did you speak to him upon his arrival?

A. Yes.

Q. Had any reservation been made for his reception?

A. Yes.

Q. Where?

A. At the Riverside Hotel.

Q. Had Mr. Vanderbilt prior to March 5, 1953, from time to time resided at the Riverside Hotel?

A. Yes.

Q. Now, did he tell you what he was doing in the State of Nevada on March 5, 1953?

Mr. Winsten: The answer should be yes or no, your Honor, because I am going to object to any substance.

Mr. Rosenblatt: Don't be frightened.

Q. Mr. Harmon, just answer yes or no.

A. Yes.

Mr. Winsten: If the witness is being called for a conversation, I object.

The Court: He said yes. Next question.

[fol. 413] Q. And what was the conversation?

Mr. Winsten: That is objected to.

The Court: Objection sustained. Next question.

Q. Mr. Harmon—by the way, you are the same Jack Harmon who was identified in the courtroom yesterday?

A. Yes.

Q. Now did you see Mr. Vanderbilt after March 5, 1953?

A. Yes.

Q. How often?

A. I saw him daily during the balance of the month of March, all of the month of April, all of the month of May, and I would say until about perhaps the 20th, 18th or 20th of June.

Q. And when did you see him around the 20th of June?

A. I saw him on the 30th of June.

Q. The day of the divorce?

A. Yes.

Q. And I show you a photostat of a document which has been marked as Defendant's Exhibit L for Identification, and ask if you know anything about that paper writing?

A. This is a photostat of a letter to which I subscribed, but with which I was not connected at that particular time.

Q. Did you see that on or about March 8, 1953?

A. Yes.

Mr. Rosenblatt: I offer it in evidence.

Mr. Winsten: Same objection, hearsay; self-serving, your Honor.

The Court: Sustained.

Q. Now, I show you a paper writing consisting of four pages bearing a signature and ask you if you can identify that signature, the top one on the right-hand side?

A. Yes, that is the signature of Cornelius Vanderbilt, Jr. [fol. 414] Mr. Rosenblatt: Will you mark it for identification.

(Paper marked Defendant's Exhibit V for Identification.)

Q. Now, are you familiar with the premises 2305 Arlington Avenue, Reno, Nevada?

A. Yes.

Q. Did you visit those premises in or about the month of June, 1953?

A. He moved into that particular house on June 30th, partly moved in, and I visited with him while his first entrance into the home.

Q. Do you know whether or not a lease was made between Mr. Vanderbilt and L. B. Thomas with respect to those premises?

A. I do.

Q. And is this the lease?

A. That is the original lease, which has since been renewed.

Mr. Rosenblatt: I offer it in evidence.

Mr. Winsten: That is objected to, your Honor, on the

ground it is not binding on the plaintiff and no proper foundation has been laid, incompetent and immaterial.

The Court: Did you negotiate this lease?

The Witness: Pardon me?

The Court: Did you negotiate this lease?

The Witness: No, I did not, sir.

The Court: Is your signature on any of this paper?

The Witness: No. My signature is not on it.

The Court: Objection sustained.

Q. Where was the residence of the defendant, if you know, of Mr. Vanderbilt, on the 30th of June, 1953?

[fol. 415] Mr. Winsten: That is objected to, if your Honor please, as calling for a conclusion.

The Court: The objection to the form of the question is sustained.

Q. Where did Mr. Vanderbilt live on June 30, 1953?

A. Riverside Hotel.

Q. Where did he live on July 1, 1953?

A. 2305 Arlington Avenue, Reno, Nevada.

Q. Did you know that he lived there under a lease?

A. Yes.

Q. Of your own personal knowledge?

Mr. Winsten: That is objected to on the same ground, if your Honor please. The lease has been excluded from evidence.

The Court: Objection sustained.

Mr. Winsten: And I move to strike it out.

The Court: Describe the premises.

The Witness: It is a three-bedroom house with two baths. The two bedrooms and one bath are reserved for the exclusive use of Mr. Vanderbilt. One bedroom and bath in the kitchen area is occupied by his housekeeper.

Q. I show you a paper writing bearing date the fourth day of May, 1954, and call your attention to a signature on the second page thereof, and ask you if you can identify the signature, the bottom one?

A. Yes. That is the signature of Cornelius Vanderbilt, Jr.

Mr. Rosenblatt: I offer this paper in evidence.

Mr. Winsten: I object to it, if your Honor please, upon the ground there is no proper foundation laid, it is not [fol. 416] binding upon the plaintiff and it is incompetent, irrelevant and immaterial.

The Court: What is it? I have not seen this.

Mr. Rosenblatt: It is a renewal of the original lease for the same premises.

The Court: Objection sustained.

Mr. Rosenblatt: May it be marked for identification?

(Paper marked Defendant's Exhibit W for Identification.)

The Court: Did you have anything to do with negotiating the second lease?

The Witness: No—oh, yes, I did, indirectly; Nell Thomas happens to be also a friend of mine, and I had some conversation with her for Mr. Vanderbilt with respect to the second lease.

Q. Was this lease entered into between Nell Thomas and Mr. Vanderbilt as a result of your conversation?

A. Not entirely so, no, but——

Q. All right, Mr. Harmon. Did a time come when you took employment with Mr. Vanderbilt?

A. Yes.

Q. Will you tell his Honor when?

A. In August of 1953.

Q. And as an employee of Mr. Vanderbilt's are you still in his employment today?

A. Yes.

Q. Do you have an office in Reno, Nevada?

A. Yes.

Q. Do you have any other offices of Mr. Vanderbilt's anywhere than Reno?

A. No, not other than Reno.

Q. Can you tell me whether you know that Mr. Vander- [fol. 417] bilt received mail in various places in the United States?

A. Mail is addressed to him in various places in the United States, yes.

Q. And can you tell me, if you know personally, what happens to that mail?

A. Well, a great part of it comes to Box #654, Reno, Nevada, forwarded to us.

Q. Are you familiar with the instructions to the various places of mailing address to in turn forward the mail to the box number in Nevada?

Mr. Winsten: That is objected to, your Honor, on the ground it incorporates a conclusion and hearsay, and use of the word "instructions". Whose instructions?

The Court: Objection sustained to the form of the question.

A. Yes, I received instructions—

The Court: Just a moment.

Mr. Rosenblatt: I consent that that be stricken.

The Witness: I am sorry.

Q. Do you have any instructions from Mr. Vanderbilt with respect to mail?

A. Do I have now?

Q. Yes.

A. Well, yes.

Mr. Winsten: I respectfully move that the answer be restricted to a yes or no at this point.

The Witness: Yes.

Q. Have you given instructions on behalf of Mr. Vanderbilt to any places where mail is addressed to him other than in Reno, Nevada?

[fol. 418] Mr. Winsten: That is objected to on the ground it is hearsay, your Honor.

The Court: Objection sustained.

Q. Does your office in—where is that office, by the way?

A. 15 First Street, First National Building, Reno, Nevada.

Q. And are any enterprises or corporations tenants of that office?

A. I beg your pardon.

Q. Is anybody occupying that office besides yourself?

A. You mean my particular office?

Q. Yes.

A. No, I have the exclusive use of that office. However, that is headquarters for various enterprises.

The Court: Whose enterprises?

The Witness: Pardon me?

The Court: Whose enterprises?

The Witness: Various corporations. Nevada corporations, your Honor.

Q. Are there any corporations that you work for as part of your duties for Mr. Vanderbilt?

A. Yes.

Q. Are they Nevada corporations?

A. Yes.

Q. Do you want to name them to his Honor?

A. I am secretary of Vanderbilt Enterprises, Travel with Vanderbilt, and also secretary of the Intercontinental Association, employers of Mr. Vanderbilt as a writer.

Q. You say they are all Nevada corporations?

A. Yes.

Mr. Rosenblatt: That's all.

[fol. 419] Cross-examination.

By Mr. Winsten:

Q. Mr. Harmon, since the time you knew Mr. Vanderbilt, you have done many favors for him, have you not?

A. That's right.

Q. And Mr. Vanderbilt has done many favors for you, has he not?

A. That's right.

Q. Now, you testified that you were with Mr. Vanderbilt every single day, as you stated, after March 5th, 1953, during the month of March, during the month of April, during the month of May, and until the 18th or 20th of June; is that correct?

A. Yes.

Q. Did you live with Mr. Vanderbilt?

A. No, I did not.

Q. How can you recall, tell the Court what there was in this situation that permits you to testify today that you were with Mr. Vanderbilt every single day from the 5th of March, 1953, and until the 18th or 20th of June, 1953?

A. For a greater part of that time the residence at 2305 Arlington Avenue was being used as the official headquarters of Intercontinental Associates in the compilation of Cornelius Vanderbilt's personal travel directory through Europe, and I was asked to assist in supplying the secretarial staff for that organization, and to assist in other ways, all looking toward the future and a connection with the organization.

On Sundays I might say, when there was no secretarial activity, Mr. Vanderbilt usually entertained, cocktails, or something, in his home, so I believe that I can say that every day, consistently, during the period mentioned I saw him.

Q. Now, did you know that you were going to be called upon to testify here in this action?

A. No, I did not know that I was to be called.

[fol. 420] Q. When for the first time did you know that you were going to be called as a witness here?

A. Ten minutes, fifteen minutes ago.

Q. Well, were you present here throughout the trial, Mr. Harmon?

A. Yes, I was.

Q. You were present here since at least Monday?

A. That's right.

Q. When did you arrive in New York?

A. I arrived in New York Wednesday morning a week ago.

Q. That would be January 4th or 5th?

A. Yes.

Q. Of this year?

A. Yes.

Q. What caused you to come to New York?

A. I was asked if I was free to come to New York to testify if I would be called to testify, concerning his residence in Nevada at various times since I met him.

Q. Mr. Harmon, when were you told about that?

A. On Tuesday, I believe, of the day preceding my arrival here.

Q. Was that the first time you ever knew or you ever were told by anybody that you might be a witness in any matrimonial action between Mr. and Mrs. Vanderbilt?

A. No, it is not. After he returned to his home in Reno on March 5th I assumed that I might be called to testify as to his residence in Nevada; but that and this particular occasion are the only two times. In fact, nobody told me. That was an assumption.

Q. I see. Then between the time of his arrival in March of 1953 in Reno, and the time you were notified recently—when was that, would you say?

A. Tuesday, a week ago.

Q. The time you were notified a week ago that you would be a witness here, nothing had ever been said to you that you might be a prospective witness with respect to Mr. Vanderbilt's domicile in Reno?

[fol. 421] A. Mr. Winsten, I was not notified Tuesday that I was a witness here. I was notified that there was a probability of it, if I was free to go to New York.

Q. When he arrived in Reno in March, on March 5th, 1953, you testified just now that you made an assumption without being told that you might be a witness, is that correct?

A. That's right.

Q. And based upon that assumption, without being told, you are now here to testify that you saw Mr. Vanderbilt every single day during that period, is that correct?

A. No, you have the two issues confused.

Q. I am sorry.

A. I am speaking now that I assumed that I would be called as a residence witness in the State of Nevada to testify there as to his residence requirements, not anything further than that.

Q. And you were prepared to say by reason of that assumption, mind you, that he was in the State, in Reno, every single day during that period, is that correct?

A. No, I don't understand what you mean by reason of the assumption. By the reason of the fact, I saw him, I was prepared to testify if called upon.

Q. Did you keep a diary in that respect?

A. No, I do not.

Q. I want you to tell the Court how you come to say at this time so positively that you saw Mr. Vanderbilt for that period. Now that is a period of one, two—more than three months.

Mr. Rosenblatt: May it please your Honor, I submit that the witness was just interrogated a few minutes ago about that and gave his explanation.

The Court: I will let him answer again.

[fol. 422] A. I can only repeat that I was requested to assist Mr. Vanderbilt and Mr. Parker in setting up a headquarters at which a greater part of the Cornelius Vanderbilt's personal travel directory for Europe was compiled.

Q. Now you told us that you did not keep any diary. Did you make any other notation of any other kind to indicate each day that you saw Mr. Vanderbilt during that period?

A. No, I did not, Mr. Winsten.

Q. Then what you are telling this Court here today is based upon your recollection at this time that you had seen Mr. Vanderbilt every single day during that period, is that correct.

A. That is correct.

Mr. Rosenblatt: That is not so, your Honor. He is testifying to his knowledge.

Mr. Winsten: Well, it still is a recollection.

Mr. Rosenblatt: His knowledge based on recollection.

The Court: I will let it stand. Go ahead.

Q. Now during the period between March 5 and June 18 or 20, you have testified, of the year 1953, was Mr. Vanderbilt giving any lectures?

A. No, not during that period.

Q. Are you quite sure of that?

A. I believe he did make one lecture trip into California.

Q. And how long was he gone?

A. I think only two days.

Q. When was that, sir?

A. I don't recall exactly. I do recall, I think now, putting him on a train and picking him up from this train on his return.

Q. Did you recall whether it was in the month of March [fol 423] or in the month of April or in the month of May or in the month of June?

A. I am under the impression it was the latter part of March.

Q. And where did he go?

A. Some little place over in California, I think it was in Oakland.

Q. Did he ever go back to the East, to New York, during that period?

A. Not that I know of.

Q. Are you quite sure of that, Mr. Harmon?

A. I said not that I know of.

Q. Well, you testified very positively, this afternoon, that he had never been—that you saw him every single day between the 5th of March and the 18th of June, 1953, did you not?

A. That's correct.

Q. Now you tell us that he was away for two days during that period?

A. No, I did not say that he was away from Reno for two days.

Q. I misunderstood you. You said he was away for two days lecturing. If I misunderstood you please correct the record.

A. To the best of my memory he was away one lecture night during that period, but he left Reno in the early morning, as I recall it, went to Oakland for his lecture, and he returned the following day. Now that is the best recollection I can give you. I saw him every day then to the best of my recollection.

Q. Are you familiar with the handwriting of Mr. Vanderbilt?

A. I believe so.

Q. Now I show you Plaintiff's Exhibit 14 in evidence, Mr. Harmon, and I direct your attention to the postmark on that, and I also ask you this question: Is that in the handwriting of the defendant?

A. Yes, that appears to be.

Q. And where is that postmarked?

A. It is postmarked New York.

Q. Now, Mr. Harmon, do you notice the date of that postmark?

A. I do, it is a little blurred, but I think it is marked the 18th.

Q. Of what year?

A. 1953.

[fol. 424] Q. Well, don't you know that the defendant was in New York in March of 1953?

A. I do not.

Q. Well, after seeing Plaintiff's Exhibit 14 would you want to modify your statement that you saw him every single day between March 5 and June 18th or 20th of the year 1953?

A. Not based on the postmark on that postcard, sir; I would not change my testimony.

Q. Now, how far is Riverside from Oakland?

A. Pardon me?

Q. How far is Riverside from Oakland?

A. Riverside?

Q. Yes.

A. Oh, I don't know, possibly 485 miles, 500 miles.

Q. Now was it your testimony that Mr. Vanderbilt went to Oakland, is that correct?

A. To the best of my knowledge and belief, yes.

Q. How far is Oakland from Reno?

A. About 234, 5 miles.

Q. And how far is Reno from Riverside?

A. I would say about 480 miles.

Q. And what sort of trip communication is there between Reno and Oakland? Transportation, I should say.

A. Every form of modern transportation—train, plane, busses.

Q. And what form of transportation is there between Reno and Riverside?

A. I imagine the same situation.

Q. Where is the nearest plane airfield to Riverside, if you know?

Mr. Rosenblatt: I have listened to this long enough, your Honor. This is no expert on railroads, busses or plane communications.

[fol. 425] The Court: If he knows he can testify.

Mr. Rosenblatt: I object t it.

A. I don't know where the closest field is.

Q. I show you this postcard, and ask you if you recognize the handwriting that is written on there?

A. Yes, that seems to be Mr. Vanderbilt's handwriting.

Mr. Winsten: I offer it in evidence.

Mr. Rosenblatt: I have no objection, your Honor, providing the witness will testify as to what is in Mr. Vanderbilt's handwriting and what is in obviously an entirely different handwriting.

Mr. Winsten: Well, I will concede, your Honor, that the original address was changed and that is not in Mr. Vanderbilt's handwriting.

Q: Is that correct, Mr. Harmon?

A. Well, that is a little difficult to determine, which is the original address there and which is not.

Q. Read the address there and which part is in Mr. Vanderbilt's handwriting.

A. The upper line, Pat M. Wallace Vanderbilt, and the lower line here, New York City, New York, is in his handwriting; and on the message side of the card, that seems to be in his handwriting.

Mr. Winsten: May it be marked, your Honor.

The Court: Mark it.

(Received in evidence and marked Plaintiff's Exhibit 27.)

Q. Now, Mr. Harmon, are you sure that those [fol. 426] were the only two lectures that he gave during that period?

A. No, I am not sure about that.

Q. You are not sure about that?

A. No. What two lectures are you speaking of?

Q. The two that you told us about, the one in Oakland—you say he went to Oakland to lecture, do you not?

A. As far as I know, that's where he went, yes.

Q. I ask you are you sure those were the only two lectures?

Mr. Rosenblatt: Now, may it please the Court, there is no evidence about any two lectures.

The Witness: I don't know anything about that.

Mr. Winsten: Question withdrawn.

Q. You say he was gone for two days. Is that what you said?

A. No, I did not say that. I said he was not for part of two days.

Q. Part of two days?

A. Yes.

The Court: This Plaintiff's Exhibit 27, can we agree on the date on the postcard? There is a five there, and I assume——

Mr. Rosenblatt: May I see it a second, your Honor?

The Court: It says March something.

(Conference between the Court and counsel at the bench.)

The Court: It is March 4, 1953. Is that the date?

Mr. Winsten: It looks like March 4th to me.

[fol. 427] The Court: That's the day before he arrived, as this witness testified he arrived in Reno, Nevada.

Mr. Winsten: That's right.

Q. Now, where did Mr. Vanderbilt come from on March 5th, if you know?

A. On March 5th?

Q. Yes.

A. He came in by train.

Q. From where?

A. From the East, I believe from Chicago.

Q. Do you know where he was on March 4th?

A. No. I assume Chicago or en route.

Q. Now this Plaintiff's Exhibit 27 in evidence indicates a postmark of Riverside, California on March 4th, 1953. Does that suggest anything to you as to where he was or where he came from?

A. No particular significance except the fact that he has a habit sometimes of sending postcards to friends to be mailed so that his whereabouts are not readily discernible.

Q. In order to conceal his whereabouts, is that correct?

A. Well, I say that happens at times, yes.

Q. Has that happened very often?

A. I cannot say how often that happens. I have known it to happen.

Q. You have known it to be something that he has done on more than one occasion, is that correct?

A. I did not say anything about more than one occasion. I said I know he has done it.

Q. Do you know of any friend that he has in Riverside, California?

A. No, I do not.

Q. Now, let us get back to these lectures here. You said that you could not say positively that he gave no other than those—I withdraw that—that he was not out of—that you saw him every day except those two days when he was gone for parts of the day, is that correct?

[fol. 428] Mr. Rosenblatt: He said he saw him every day, your Honor. He said it three or four times now.

The Court: He said including these two days.

Q. Are you able to tell this Court, Mr. Harmon, that Mr. Vanderbilt gave no other lectures during that period?

A. No, I am not able to say that.

Q. You are not able to say whether he gave any lectures in the Midwest or in the East during that period?

A. No. If he did I would not have the slightest knowledge about it because, I reiterate, to the best of my knowledge and belief I saw him in Reno every day during the period I indicated.

Q. Are you familiar with the residence requirements in the State of Nevada?

A. Yes.

Q. And how long have you been familiar with those residence requirements?

A. I would say since the law was enacted, probably since 1933.

Q. Tell the Court what those residence requirements of the State are:

Mr. Rosenblatt: May it please the Court, I don't know of his judicial or professional qualifications for this.

The Court: Objection sustained.

Mr. Winsten: He stated that he knew them, your Honor.

The Court: Know what—the law? Do you want to make him an expert on residence?

Mr. Winsten: He said he knew them.

The Court: Do you want to make him an expert?

Mr. Winsten: No, sir. I just want to know what he claims his knowledge to be.

[fol. 429] The Court: How is that relevant, what his knowledge is?

Mr. Winsten: It has a relevancy to this cross-examina-

tion, your Honor. If I would indicate it to you, it might destroy the effectiveness of my cross-examination.

The Court: All right, let him tell it.

Mr. Rosenblatt: Wait a minute. I submit that from this point on in connection with qualifications or knowledge, that this man is going to show that he has, or what it consists of, that he is a witness of the plaintiff and not mine.

The Court: All right, go ahead.

Mr. Rosenblatt: And the plaintiff is going to be bound by what he says.

Q. Mr. Harmon, what is your idea on the residence requirements in the State of Nevada?

Mr. Rosenblatt: May it please the Court, I never heard that a man could testify to ideas.

The Court: Objection sustained to the form of the question. He either knows or he does not know. If you want to ask him the question directly——

Q. Mr. Harmon, did you testify—did you ever testify in a divorce action in Nevada?

Mr. Rosenblatt: I object, your Honor.

The Court: Objection sustained.

Q. Did you testify in the defendant's divorce action against this plaintiff in Reno?

A. No.

Q. Did you?

A. No.

[fol. 430] Q. Now, after June 18th or 20th did the defendant leave Nevada at any time?

A. I cannot answer that because I left Nevada several times during that period.

Q. Well, how long were you away from Nevada in that period?

A. I was away from Nevada for several days during that period.

Q. About how many days, Mr. Harmon?

A. Well, it is a little difficult for me to say exactly how many days I was away. I was away for a number of days out of the state entirely, and for a number of days I left very

early in the morning on business up around the Lake Tahoe area, and I did not get back until late in the evening.

Q. But generally you have been in constant attendance at this office that you talked of ever since the time of your employment, isn't that correct?

A. That was not during the term of my employment.

Q. Well, your employment began in August of 1953, you said?

A. That's right.

Q. And your employment continued until now?

A. That's right.

Q. Were you in attendance daily at the office during that period from August, 1953, until now?

A. Was I in attendance in August?

Q. At the office?

A. No, I was not.

Q. How often did you come to that office?

A. When I am in Reno, I am at the office practically every day.

Q. Tell us, were there any periods of time in that period that you were not in Reno?

A. Oh, yes.

Mr. Rosenblatt: Is this since August 15, 1953?

Mr. Winsten: That's right.

[fol. 431] The Witness: I have in New York, Boston——

Q. Tell us about it. When did you go and how long did you remain away, sir.

A. Since August, 1953?

Q. That's right.

A. I hold a real estate operator's license in the State of Nevada, and one of my projects was to locate some lake-front property for a man whose business it was to develop that, so I was in and out of Reno the latter part of June on several occasions.

Again, during July and August, I was out of Reno on several occasions from early morning until late at night.

In April of 1953 I was in Washington.

Mr. Rosenblatt: Just a minute. I think the witness—you mean 1954?

A. I am sorry; April of 1954.

Mr. Rosenblatt: Counsel asked you about the time from August 15, 1953. If you can tell him, please do.

Q. Do you mean 1953 or 1954, now?

A. This is April, 1954, that I am in Washington.

Q. How long were you in Washington then?

A. About five days.

Q. And except for these periods that you have been out of town from morning till night, and except for this period when you went to Washington, what other periods were you away from Reno?

A. On the trip that I was in Washington, I continued on into New York City. I was here for about ten days, I believe. I was in Boston a couple of days during that trip.

[fol. 432] Q. I don't want to know where you were. How many days were you away from Nevada on that occasion?

A. I would say on that particular trip approximately three weeks.

Q. Now, were there any other periods during which you were away from Reno, other than those you have testified to?

A. Yes. Following that I was in New York again from the latter part of August until about the—I was in New York for about a week, the latter part of August, up till about Labor Day.

Q. That is in 1954?

A. 1954.

Q. And the other period that you were away?

A. The present trip—yes I was in Los Angeles, I believe, on two trips since August, 1953.

Q. What was the total period you were away from Reno on those two trips?

A. I believe I was in Los Angeles about an average of a week on each of those trips.

Q. Now, have you told us all the periods of time that you were not in Nevada during the period after August of 1953, until the present day?

A. No. There were a couple of trips to San Francisco, too. However, I was not away from Reno overnight. I would fly down in the morning and fly back at night.

Q. Now you have told us all of that, right?

A. To the best of my knowledge, yes, sir.

Q. Now, you were in Reno on all the other occasions every day; is that correct?

A. Yes.

Q. Except the periods that you have told us you have been away since August 1953?

A. What other periods are you speaking of?

Q. All that you have told us now, is that correct?

A. You are speaking of March, April, May and June?

[fol. 433] Q. No. I withdraw my question and I will reframe the question. I am talking about the period from August, 1953 until today. Except for the periods you have specifically indicated to me in your testimony just now, you were in Reno every single day, is that correct?

A. To the best of my knowledge and belief, yes.

Q. And you were then in the employ of the defendant; is that correct?

A. That is right, partially so.

Q. Well, did you go to the office every day at this First National Bank Building?

A. I imagine every office day, yes.

Q. Were you cognizant of the whereabouts of the defendant during that period when you were in Reno?

A. Of the whereabouts of the defendant?

Q. Yes.

A. I might say that generally speaking I knew about where he was, yes.

Q. Now tell us the various places that the defendant went to when he left Reno during that period after August, 1953, between August, 1953, and the present day?

Mr. Rosenblatt: If you can.

Mr. Winsten: I don't think the witness needed that suggestion.

Mr. Rosenblatt: Well, it is very obvious, your Honor, that he was not with the defendant.

The Court: Come along. Let us see what he has to say.

Mr. Rosenblatt: And he could give you—I don't know what.

Mr. Winsten: We will find out.

A. Well, the defendant was in Washington.

[fol. 434] Q. When, and for how long?

A. Well, now Mr. Winsten, I don't—I cannot give you

the exact dates nor the exact length of time that he was in any of these places that I propose to mention, if you will let me mention them.

Mr. Rosenblatt: May it please the Court, I object to any of this testimony unless this witness can testify that he personally was with the defendant at such and such a place and at such and such a time.

The Court: Objection sustained. You can only testify to your own personal knowledge.

Q. Mr. Harmon, you can testify from your personal knowledge whether the defendant was or was not in Reno during any period, can you not?

A. I can testify that he was there if I saw him.

Q. That's right.

A. Yes.

Q. You can also testify, can you not, Mr. Harmon——

The Court: That form of question is not permitted. Just ask him the question directly.

Q. Was there a period during the latter part of 1953 and the early part of 1954 when the defendant was away from Reno for an extended period of time?

A. I cannot answer that directly without some reference to his whereabouts or the dates.

Q. Unless I suggested where he was you could not answer it, is that your testimony?

A. I believe he was away from Reno sometime during that period.

Q. Now, don't fence with me, Mr. Harmon.

A. I am not fencing with you, Mr. Winsten.

[fol. 435] Q. If you know that he has been away, please tell the Court.

A. Mr. Winsten, I grant without any question that he has been away from Reno at various times during the period that you are now covering.

Q. We want to know your knowledge on the subject and that's all.

Mr. Rosenblatt: And I submit, if your Honor please——

The Court: Do you know the specific dates when he was away?

The Witness: Your Honor, I know the dates that I was with him personally when he was away from Reno.

The Court: Tell us that.

The Witness: I was with Mr. Vanderbilt in Washington in the latter part of April, 1954.

Q. How long were you with the defendant during that period when you were outside the State of Nevada?

A. Four days.

Q. Did you know, Mr. Harmon, that the defendant was in the State of Florida during any parts of the months of October, November or December of 1953 or January or February of 1954?

A. I cannot testify definitely to that. I was not with him.

Q. Did you communicate with the defendant by telephone or other means of communication—I withdraw that. Did you have any communication between yourself and the defendant at any time during the months that I mentioned when the defendant was in another State other than Reno, Nevada?

A. Yes.

Q. Other than indicated, I should say.

A. Yes. I have talked with him at various points.

[fol. 436] Q. Have you ever talked with him when he was in the State of Florida?

A. Yes, I believe I have.

Q. And when was that time?

A. Mr. Winsten, I cannot pin-point the dates. I will be very happy to admit it if you can refresh my recollection.

Q. How often did you communicate with the defendant, or did he communicate with you when he was not in Reno?

A. Well, no regular schedule; sometimes I would get mail from him, a telephone call, or a telegram two or three times a week.

Q. Then is it your testimony, Mr. Harmon, that in one form of communication or another you heard from him about two or three times a week, is that correct?

A. To the best of my knowledge, yes.

Q. Well, did you get communications from the defendant in one form or another as you testified, where the defendant was absent from the State of Nevada, or where such communications indicated that he was not in the State of Nevada?

A. Yes.

Q. Now, did you get such communications in one form or another in the State of Florida?

A. I believe I did, yes.

Q. And over how long a period of time did you get those communications from the defendant in the State of Florida?

A. I cannot hazard an answer to that, Mr. Winsten, because I don't know how long a period of time.

Q. If I were to suggest to you, Mr. Harmon, that the defendant was visiting his friend Ed Parker in Miami Beach, Florida, for several months during that period from November 1953 until the early part of 1954, would you say that was correct?

Mr. Rosenblatt: Now, may it please the Court, I object [fol 437] to that as completely improper, not gone into on the direct examination, and an attempt to impeach the witness who is now his witness on this point, and finally, if counsel has such information and can so testify, I suggest that counsel take the stand.

The Court: I will allow it. This is cross-examination. Go ahead.

The Witness: The question again, please?

The Court: Do you know whether he was in Miami, or Florida, as he put it, between November—and what is the other date?

Mr. Winsten: Between November 1953 and February 1954?

The Witness: I think he was there a part of that period, yes.

Q. Was it a rather extended visit, sir?

A. I would not call it a visit, Mr. Winsten. He was there working with Mr. Parker, as I recall it now, on his travel directory.

Q. And how long do you know he was there?

A. I don't know how long he was there.

Q. How long was he away from Nevada during that period?

A. I cannot answer that question, sir.

Q. You cannot tell this Court how long he was away from Nevada at that time?

A. I certainly cannot, I have no records with me at all.

Q. But you can tell this Court that you saw him every day from March 5, 1953 until June 18th?

A. That's correct.

Mr. Rosenblatt: I object to that, sir, and I ask that that question be stricken.

The Court: Strike it out.

[fol. 438] Q. Did you know that the defendant had gone to Connecticut during the summer of 1953?

A. The summer of 1953?

Q. That's right, sir.

A. What part of the summer, Mr. Winsten?

Q. Any part of the summer?

A. No, I don't know that.

Q. Well, will you deny—could you deny that he went to Connecticut——

The Court: Objection sustained.

Q. As far as you know he could have been there, is that so?

A. It is possible, yes.

Q. Where is the defendant now, do you know?

A. At this moment?

Q. Yes.

A. I believe he is in Miami.

Q. When did you last communicate with him?

A. Last night.

Q. By telephone?

A. That's right.

Q. Did he know that you were coming here?

A Well, he knew it Wednesday when I arrived here that I was here, yes.

Q. Is he staying with Mr. Parker in Miami, that you know?

A. I believe he is, sir.

Q. Did you discuss your testimony with anybody before you took the witness stand?

A. My testimony, I might say, no, I don't know what you mean by my testimony, because I have no idea if I were called what questions I was going to be asked and I was not prepared to have any stereotyped answers to them.

Q. You were not?

A. No.

Q. Did you know that you were going to be asked whether you saw Mr. Vanderbilt every day between March 5, 1953 and June 18, 1953?

[fol. 439] A. I would say that I did not know that I was going to be asked that question.

Q. That came as a complete surprise to you, Mr. Harmon?

A. Mr. Winsten, if you will recall when you asked me that question awhile ago I stated that upon Mr. Vanderbilt's return to Reno, Nevada on March 5th, that I, as a very close friend of his, assumed that I would be called probably as a resident witness in his divorce action against Patricia Vanderbilt.

Mr. Winsten: Now, your Honor, I move to strike that out as not responsive. Will the stenographer please repeat the question?

The Court: I will allow it to stand.

The Witness: And I assumed that I would be called as a resident witness to qualify his resident requirements there.

Mr. Winsten: I will interrupt the witness and ask the Court to direct the witness to answer the question, if your Honor please.

The Court: Give him the question.

The Stenographer: "Q. That came as a complete surprise to you, Mr. Harmon?"

The Witness: What came as a complete surprise?

The Court: About being questioned about the dates.

Q. That you saw Mr. Vanderbilt every day from March 5, 1953, to June 18th.

A. No, it did not come as a complete surprise.

Q. Had you had any discussions with any of Mr. Vanderbilt's lawyers concerning the fact that you saw Mr. Vanderbilt every day during that period?

A. Yes, I did.

Q. And whom did you discuss it with.

[fol. 440] A. With Judge Sinai in Reno. I was asked if I recalled those dates and I stated that I did, and upon arrival here I was asked if I remembered those dates by Mr. Rosenblatt.

Q. Is there any significance or importance to the fact

in your mind, Mr. Harmon, that you saw Mr. Vanderbilt during that period?

A. I just stated——

Mr. Rosenblatt: May it please the Court——

The Court: Objection sustained. He already said it.

The Witness: I just stated that.

Mr. Winsten: I submit, your Honor, that that question has never been propounded to him.

The Court: You asked that in the beginning of your cross-examination, but if you want it again, I will let him answer it.

The Witness: Yes, I will be very happy to. As I stated, Mr. Winsten, I assumed——

Mr. Rosenblatt: May it please the Court, I object to the operation of the witness's mind.

Mr. Winsten: This is cross-examination, your Honor.

The Court: I will allow it. Answer it again. This is the last time you will answer it. Go ahead.

Mr. Winsten. It is the last time I will ask, sir.

The Witness: I stated, Mr. Winsten, that I assumed, having been a close friend of Mr. Vanderbilt, that I would be called upon to testify in the Washoe County courts as to the validity of his residential requirements in the matter of his divorce against Patricia Vanderbilt, and thereby those dates were very firmly established in my mind.

[fol. 441] Q. Now, what is Intercontinental Associates? What is its business?

A. Intercontinental Associates are the publishers of Cornelius Vanderbilt, Jr.'s travel directory for Europe, and our corporation set-up is such that we can qualify for almost every form for business in the State of Nevada.

Q. And does Mr. Vanderbilt hold any stock in that corporation?

A. No, sir, he does not.

Q. Is he an employee of that corporation?

A. In a manner of speaking, he is.

Q. Tell us what you mean by in a manner of speaking.

A. There is an oral agreement existing between Mr. Parker and Mr. Vanderbilt that Mr. Vanderbilt will par-

ticipate in the net profits of Intercontinental Associates to the extent of 50 per cent.

Q. Is he an officer of that corporation?

A. No, he is not.

Q. Who are the officers of the corporation?

A. Mr. Parker is the president, his sister is vice-president and I am the secretary.

Q. Where is the principal office of that corporation?

A. Reno, Nevada.

Q. Has it got a New York office?

A. No.

Q. Didn't it ever have an office on East End Avenue?

A. We had a representative there.

Q. And who is that representative?

A. Herbert Chase.

Q. Is he still a representative of the corporation?

A. He is not.

Q. Under what laws is the corporation organized?

The Court: He says Nevada.

Mr. Winsten: I am sorry, I did not hear it.

[fol. 442] Q. Did it publish that book, Cornelius Vanderbilt, Jr.'s "Personal Travel Guide for Europe"?

A. Yes, sir.

Q. And how many volumes of that were sold?

Mr. Rosenblatt: May it please the Court, I object to this inquiry. What difference does that make?

The Court: Are you interested in how much money he is making? Does he get a salary?

The Witness: No.

The Court: Did he ever get paid any money?

The Witness: No.

The Court: Did he ever get any royalties as a result of the publication of that book?

The Witness: No.

Q. Do you have anything to do with the publication of "Vagabonding With Vanderbilt," the News Letter?

A. Yes.

Q. Is the defendant the editor and writer of that publication?

A. That is correct.

Q. And what do you have to do with the publication of that?

A. I am circulation manager.

Q. And what is the circulation of that book or publication?

Mr. Rosenblatt: May it please the Court, I object to that. If he wants to ask him if he makes any money from it, I am perfectly agreeable.

The Court: What is the circulation?

The Witness: At this—I cannot give you the exact circulation of it.

The Court: Approximately.

[fol. 443] The Witness: I would say that the approximate circulation at this time is 1,200.

Q. And what is the charge made for that publication?

Mr. Rosenblatt: I object to that, your Honor. I think we are now far afield.

The Court: I will let him answer. How much do you charge? Have you subscribers?

The Witness: Yes.

The Court: What do they pay for a subscription to this publication?

The Witness: $5 per year.

The Court: Does Mr. Vanderbilt receive any salary as a result of this publication?

The Witness: No.

The Court: Did he ever get any money as a result of it?

The Witness: There have been no profits.

The Court: What happens to the money that you get for the subscriptions?

The Witness: It goes out to producing and distributing the publication.

The Court: What is this, a hobby with Mr. Vanderbilt?

The Witness: Yes, I would say so.

The Court: And do you work on this outside?

The Witness: Yes.

The Court: Do you get paid a salary?

The Witness: Yes.

The Court: And how much do you get?

The Witness: It averages about $200 a month from that particular end of it.

Q. And you get a separate salary from Intercontinental Associates, do you not?

A. Yes.

[fol. 444] Q. Now, in 1953 what was the circulation of that publication?

A. I would say close to 2,000. Now, those figures, Mr. Winsten, are from memory. I can be wrong in either direction.

Mr. Winsten: That is all.

Mr. Rosenblatt: That's all.

The Court: Is there any other evidence that you want to submit?

Mr. Rosenblatt: The defendant rests.

Mr. Winsten: That's all.

Mr. Rosenblatt: Does that mean the plaintiff rests?

The Court: Both sides rest.

Mr. Winsten: Plaintiff rests, except for the exceptions that I indicated at the close of the plaintiff's case, your Honor.

The Court: That is, inquiring into the financial——

Mr. Winsten: Yes, and the introduction of evidence of my services as attorney for the plaintiff in this action.

MOTION TO DISMISS AND FOR JUDGMENT DISMISSING COMPLAINT

Mr. Rosenblatt: On behalf of the defendant I now renew the motions previously made at the close of the plaintiff's case to dismiss and for judgment dismissing the complaint.

If your Honor wishes me to repeat all the grounds, I will be happy to do so.

The Court: I am going to reserve decision on the motion in connection with the validity of the Nevada decree, and will render my decision in the morning, gentlemen, tomorrow morning.

However, depending upon what my decision will be, if it is in favor of the defendant on that particular issue, I will, [fol. 445] of course, proceed to take testimony, or additional testimony, if there is any, under Section 1170-B, of the Civil Practice Act, in connection with the maintenance and

support of the plaintiff, without, *of* course, the defendant waiving any rights that he may have in raising any legal question in connection with my right to do so.

Mr. Rosenblatt: I will have the right to make motions at that time, I presume, if your Honor please?

The Court: Of course. In the event that I do not rule in favor of the defendant on the question of the validity of the Nevada decree and on the question of domicile of the defendant in Nevada at the time, then of course if you have any evidence to offer in connection with your defense to the action for separation based on cruel and inhuman treatment and non-support, at that time you may be free to offer whatever evidence you may want to in connection with that particular phase of the case.

Now, is that clear, gentlemen?

Mr. Rosenblatt: That is clear, sir.

Mr. Winsten: I just want to make one statement, your Honor, in considering the question of domicile I want your Honor to consider that there has been no proof of any intention on the part of the defendant to make Nevada his permanent place of residence.

(Whereupon the trial was adjourned to the following day, January 14, 1955, at 10:00 o'clock A. M.)

[fol. 446] RULING ON MOTION TO DISMISS

New York County Court House,
60 Centre Street,
New York, 7

January 14, 1955.
10 a.m.

TRIAL CONTINUED

Appearances: (Same as heretofore.)

The Court: Are counsel ready in this case, both sides?

(Counsel indicate in the affirmative.)

The Court: Gentlemen, last night I reserved decision on the motions in respect of the validity of the Nevada decree. I am now prepared to render my determination in

respect thereof, and the defendant's motion to dismiss the complaint.

The first affirmative defense interposed by the defendant to this complaint for a legal separation is the fact that the defendant obtained a final decree of divorce from the plaintiff on June 30th, 1953, in the Second Judicial District Court of the State of Nevada, in the County of Washoe. That decree is in evidence.

Plaintiff seeks to impeach the bona fides of the defendant's domicile in Nevada, thereby attacking the validity of the Nevada decree.

Under the holdings of the United States Supreme Court in the well-known case of Williams vs. North Carolina, 317 [fol. 447] U. S., and the line of cases following in accord, including our own Court of Appeals, in the Matter of Holmes, 291 N. Y., and cases thereafter also in accord, it has been firmly established that a decree of a sister state is entitled to and must be given full faith and credit here, unless the party assailing the validity of such domicile upon which the decree is founded adduces proof sufficient to satisfy the court of this state that such domicile was false and constitutes a fraud upon the decreeing court.

The burden of proof in this respect is upon the person who assails the validity of that decree, and in this case, of course, is upon the plaintiff.

Firmly established is the fact that the validity of the decree being recognized as a valid decree of a court of competent jurisdiction of a sister state, the burden of proof to set this decree aside rests heavily upon the plaintiff.

Plaintiff contends that the defendant has not established a residence of any particular place in any state, but that he established one to suit his own convenience at the moment, and shifted from place to place.

In my opinion the proof presented by plaintiff to disprove the bona fides of the defendant's domicile in Nevada upon which his decree is bottomed is totally lacking in probative force and weight. Plaintiff's proof is meager, and has failed to meet the burden of proof required of her to establish by a preponderance of credible evidence that the defendant was not a bona fide resident of the State of Nevada at

the time he obtained his decree of divorce there, or that he [fol. 448] had not complied with the necessary requirements with respect to the laws of that state.

Implicit in the decree of Nevada is the finding of the jurisdiction of the person and subject matter of the proceeding, the validity thereof, and the compliance of the defendant with all the legal requirements of that state.

Furthermore, the additional testimony and documentary evidence presented now before me on behalf of the defendant establishes his residence and domicile in the State of Nevada for some period in years preceding the obtaining of his divorce there. We have the evidence of his tax returns, voting records for years, automobile registration and the renewals thereof in the State of Nevada, and furthermore of his apartment and business connection there and other businesses, the fact that he resided there before his marriage to the plaintiff, and that he has consistently over the years stated at various times and shown intent that Nevada was his place of domicile.

It is apparent from the proof that many years prior to his marriage to the plaintiff the defendant had planted his "grass roots" in Nevada, and continued this conduct to a great extent even after his marriage, though he led a life of a much and varied traveller in his work and business and other activities.

Upon his break with the plaintiff the defendant returned to his old "stamping ground." This was not a new and strange territory or jurisdiction or a new haven sought for the purpose of establishing a colorable residence for the securing of a divorce as is claimed by the plaintiff.

[fol. 449] Upon the record as it stands before me I find and decide that the plaintiff has failed to factually overcome the presumption of the validity of the defendant's Nevada decree, has failed to present any proof of probative force, and has not met or sustained the burden of proof required.

The first affirmative defense of the defendant, therefore, is a bar to the plaintiff's action for a separation, and, being sustained, the complaint bearing on this issue must be dismissed upon the merits.

In this respect this constitutes the opinion of the court pursuant to section 440 of the Civil Practice Act.

However, pursuant to the provisions of the statute, particularly and specifically section 1170-b of the Civil Practice Act, in cases such as this made and provided, I will take the proof from both parties as to their incomes and earnings and such other information as may be required and pertinent in connection with the issue of maintenance and support to be awarded, if any, to the plaintiff.

Mr. Winsten: If your Honor please, I except to the ruling of the Court on the motion as indicated by the Court, and move for judgment in favor of the plaintiff in this action, and I particularly direct your Honor's attention to that portion of your Honor's opinion which directed a dismissal of the complaint.

The complaint in this action requests a separation and support and maintenance.

The statute provides that if the Court should determine that the plaintiff is not entitled to a separation, the Court [fol. 450] has the power to make provisions for the maintenance and support of the plaintiff.

That does not contemplate even in such a case, if the Court be of the opinion that she is not entitled to a separation, that does not contemplate a dismissal of the complaint.

The Court: I think I made that clear in my final statement; that, in so far as the dismissal of the complaint is concerned it is in connection with her action against him based on cruel and inhuman treatment and non-support. But in so far as the balance of the relief requested, I indicated in the last part of my decision that I am continuing this case in order to take the testimony as to the income, resources and other necessary information in connection with the claim of maintenance and support under 1170-b.

Mr. Winsten: I see.

The Court: And continuing the case for that purpose and that purpose alone.

Mr. Winsten: Then it is my understanding from your Honor's ruling that the complaint is not dismissed in its entirety. The Court has merely denied the relief of separation, but is entertaining the action and the complaint in so far as it requests support and maintenance?

The Court: If there is any question about it, that is exactly what I mean. I said I am continuing the case, but that part of the complaint is dismissed. However, the Court is not determining at this time whether or not she will get maintenance and support, because there are certain legal questions that have been raised by counsel for the defendant which the Court will consider.

[fol. 451] Mr. Rosenblatt: Now, may it please the Court, I would like to make the position of the defendant clear upon this record.

The Nevada decree, determining that the defendant in this case is entitled to a decree of divorce from the defendant—or, from the plaintiff, rather, in this case—on the ground of extreme cruelty, ordered, adjudged and decreed that the bonds of matrimony existing between the plaintiff and the defendant as of *of* the 30th day of June, 1953, are dissolved and declared forever at an end. Further, that the marriage theretofore existing between the parties is dissolved absolutely and forever—and I quote from the decree—and they hereby are freed and released from the bonds of matrimony and all the duties and obligations thereof, and each of the parties hereby is restored to the status of unmarried persons.

Upon that decree and its provisions the defendant moves in opposition to any claim for and judgment of maintenance for the plaintiff pursuant to Civil Practice Act, Section 1170-b, first, that the maintenance provisions of Civil Practice Act, Section 1170-b, are in themselves vague, indefinite, unconstitutional and void, because they provide that the court may render such judgment as justice may require for the maintenance of the wife, and there is no wife before this court once the validity of the Nevada decree has been established.

Secondly, that these provisions in section 1170-b provide no standard or measure whatsoever for the application of justice, nor is there any determination or standards [fol. 452] provided for what conditions the divorced wife should have to establish in order to be entitled to any maintenance.

Further, that section 1170-b is in derogation of the common law of this state by providing for an allowance

to a wife against whom a valid decree of divorce exists— any provision for any maintenance.

MOTION FOR JUDGMENT AND RULING

I further move for judgment denying the plaintiff maintenance pursuant to section 1170-b upon the following grounds:

(1) Justice does not require a judgment of maintenance of the plaintiff, nor is any evidence adduced by the plaintiff up to the close of the case before you, any evidence of any requirements of either maintenance or alleged standards thereof.

(2) That the court has no jurisdiction of the subject matter of the action or of the parties thereto.

(3) That plaintiff was not a resident of New York continuously for one year prior to the time the defendant procured his Nevada decree of divorce against her, and had no matrimonial rights under the laws of the State of New York.

(4) That the defendant has never been a resident of the State of New York.

(5) That the parties hereto were not married in New York, and never were domiciled in New York as husband and wife, and New York has no lawful interest in the subject matter of section 1170-b.

(6) In so far as the residential requirements of the Civil [fol. 453] Practice Act, section 1165-a, are applied in this action in support of any award of maintenance under section 1170-b, then in this case section 1165-a is unconstitutional and void in that that section denies full faith and credit to the Nevada divorce decree as of the date it became effective and was rendered.

(7) That in so far as section 1170-b is attempted to be applied in this action, it is violative of the constitution of the State of New York, article 1, and of the constitution of the United States, articles 1 and 4, and amendments thereto, articles 5 and 14; and is entirely void in that, among other things

(a) by reason of its assertion, it does not give full faith and credit to defendant's Nevada decree;

(b) it is discriminatory and denies the defendant the equal protection of the laws, including the protection of the law of his domicile of Nevada;

(c) it is retroactive and ex post facto in its effect herein; and

(d) it denies defendant due process of law.

Finally, that the validity of the Nevada divorce decree being established, that final decree must be given full faith and credit in every aspect of the rendition of that decree, and this court may not enter into a new enquiry concerning the marital disputes, rights, liabilities or obligations of either of the parties.

[fol. 454] I ask your Honor to consider this motion, and to permit the defendant sufficient time, with a study of the record and with a study of the applicable cases, to be permitted to file a brief before any further testimony is adduced in this case, because if your Honor should find that section 1170-b is not applicable in this case, that would certainly dispose of the entire matter. If your Honor should find that if this were a New York decree instead of a Nevada decree, your Honor would have no authority to thereafter award any maintenance. That would dispose of the entire matter.

And finally, if your Honor, still determined that the court, upon consideration of all of these questions which I desire to brief with references to the record, still has a jurisdiction, then your Honor should give to the parties, and particularly to the defendant, a statement of what requirements are to be met in the application of the sentence "as justice may require" in section 1170-b.

At the risk of continuing too long, I might point out to your Honor, and I think your Honor is entitled to the benefit of this observation, that once the parties are no longer man and wife, there is a very serious question before your Honor, if you upheld the constitutionality and applicability of section 1170-b in this case, as to what maintenance means.

Is it the maintenance that is given by the Domestic Relations Court, or by the relief agencies? Is it some new

formula or standard of maintenance unheard of yet in the law?

[fol. 455] Surely it isn't alimony, because alimony can only flow in favor of a wife who has been adjudged entitled to a decree of divorce against her husband, and that is not this situation.

I therefore respectfully request that your Honor continue this matter, and take the thinking and briefs of the parties with respect to these very, very serious problems before requiring further evidence on any subject.

Mr. Winsten: Now, if your Honor please, to further elaborate my exception to your Honor's decision on the denial of the separation, at first I should like to request permission to submit a brief on the subject. Although your Honor has made a decision, I request permission for the submission of a brief which your Honor should consider in connection with your decision although it has already been made.

In that connection I should like to point out to your Honor that although your Honor did say that the defendant did maintain a residence in the State of Nevada for many years——

The Court: Well, you're not going to argue against my decision at this time, are you? I have made my decision in so far as the Nevada decree is concerned.

Mr. Winsten: I'll request permission to submit a brief on the subject.

Now, in connection with the motion made by Mr. Rosenblatt with respect to section 1170-b——

The Court: So that I may make it clear and so that there [fol. 456] be no question about it, I have dismissed that part of the complaint where the defense set forth is a claim that the Nevada decree is a bar to this action if we are to give full force and credit, and I recognize it as a valid decree. I have so recognized it in my decision, that that decree is a valid decree.

However, this case is continued for the purposes of taking proof, as I said before, under the provisions of section 1170-b on the claim of the plaintiff that she is entitled to protection under that section to the extent that she is entitled to maintenance and support. Now for that purpose the case is continued.

I have listened to the argument of Mr. Rosenblatt, and I am going to reserve decision on all the points you raise, Mr. Rosenblatt.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Winsten: I would like to be heard in opposition to Mr. Rosenblatt's motion.

The Court: I am going along with you. Don't you want to continue this and take testimony as to maintenance and support?

Mr. Winsten: Except your Honor has reserved decision on his motion.

The Court: I don't think argument is necessary at this time because I'm going to give you all the time you need to submit whatever law you want and whatever briefs you may want to submit. Now, because this is an important question of law to everybody, it requires study on your part, it requires study on the part of the Court. There is no press. I don't know whether there has been any case decided in point with the same facts. If there is, you will be [fol. 457] kind enough to let me know. I will make my own research on it. But you have and you will have all the time necessary.

Now, as to the taking of testimony in connection with maintenance and support, are you gentlemen ready to proceed?

Mr. Winsten: Yes, to the extent that we are able at this point, as your Honor well knows.

Mr. Rosenblatt: I am not, your Honor, actually, because I don't know what the standards are for so-called maintenance of an ex-wife against whom a decree has been rendered.

The Court: Mr. Rosenblatt, I think you are premature on that. I must first listen to the testimony of the plaintiff, who claims that she is entitled to maintenance and support and let her tell us what she considers is necessary for her maintenance and support. Then you come in and make your argument, or cross-examine her, or submit what you think the law requires or does not require.

Then, of course, it is up to me to decide what standard there is to follow. There is nothing specific in the statute;

so evidently, or apparently, it may be left in the discretion of the court based on the evidence and the testimony before the court, what I may think is sufficient maintenance and support for the party, if she is entitled to it.

Mr. Winsten: May I point out to the Court, Mr. Rosenblatt has repeatedly and has now talked again about the standard. [fol. 458] Section 1170 of the Civil Practice Act, which provides for the maintenance and support of a man and wife who are married and are not divorced, uses the same language, "as justice may require," and that's the average, ordinary, run-of-the-mill separation case.

The Court: You are now making an argument in advance of the taking of the testimony.

Mr. Winsten: I am merely addressing myself to Mr. Rosenblatt's statement that there is no standard. The same standard exists for 1170-b as exists in the other identical language in 1170.

The Court: Suppose you reserve your argument for the end when you make your final application.

Mr. Rosenblatt: That's the point before your Honor.

The Court: Are you ready to proceed now, gentlemen?

Mr. Winsten: I have a memorandum that I have prepared as your Honor suggested yesterday.

The Court: Do you want time to look this over, Mr. Rosenblatt? I appreciate the fact that you were just handed this schedule, and I don't know whether you want to study it or consider it at this time.

Mr. Rosenblatt: I don't think it would make any difference after I studied it, your Honor, if this is the assertion, and I presume that the witness will take the stand to prove it. You see, if your Honor please,—and I can state this on or off the record, I don't care which——

[fol. 459] The Court: Anything you say is all right, because there is nothing in the record yet. This information isn't in the record yet.

Mr. Rosenblatt: No, it is not; so I think I ought to speak off the record.

(Colloquy between the Court and counsel off the record.)

Mr. Rosenblatt: May it please your Honor, I would like to call your Honor's attention in the genuine interests of justice to the following facts:

That all of defendant's income from trusts and estates has been tied up under sequestration orders since the commencement of this action, and he has been deprived of his means of support and maintenance since last April when this sequestration was made.

I now ask your Honor to give us a judgment adjudging that the defendant is validly divorced from plaintiff by the Nevada decree of June 30th, 1953, and I ask that you relieve us of this order of sequestration in whole or in part.

The Court: To what extent in part?

Mr. Rosenblatt: I would like at least $25,000 released from the $40,000 on hand.

The Court: $40,000?

Mr. Rosenblatt: Yes, sir.

Mr. Winsten: No, your Honor, I object to the releasing of any part of it, because we don't know first of all, if your Honor pleases, what the order of this court is going to be with respect to arrears and with respect to counsel fee. There are plenty of cases in this jurisdiction to that effect.

The Court: This application is made to my discretion. [fol. 460] Mr. Winsten: I know, your Honor, but there is also this as a matter of law: Where the defendant is a non-resident this sequestration should continue beyond even the judgment in this case.

Mr. Rosenblatt: All that he's got is right here in New York.

Mr. Winsten: I don't know about that.

Mr. Rosenblatt: It's the best security in the world.

The Court: I am satisfied that the defendant's plight financially is not as bad or as serious as the plaintiff's. I'm sure he won't be in want for any money to support himself or carry himself along until we dispose of this case, or at such time when I make a disposition of the sequestration order. We have gone along so far, and the same statement I made to the plaintiff—I think it was off the record—I make to you. She is in the condition she is now for the period she has been, she can continue a little while longer until I make a determination of this suit, and I think the sequestration order can fall in the same category.

Mr. Rosenblatt: Will your Honor sign an order, an

intermediate order adjudging the validity of the Nevada decree, so that we may submit it to——

Mr. Winsten: Just a minute, your Honor, I object to that. There can be only one order in a case, and this case hasn't concluded.

Mr. Rosenblatt: I'm not so sure about that, but let me say this, may it please your Honor. There is a warrant of arrest issued by the Domestic Relations Court on the ap-
[fol. 461] plication of this plaintiff against Mr. Vanderbilt. The court has advised me——

The Court: You mean a New York court?

Mr. Rosenblatt: The New York Domestic Relations Court. The court has advised me that on presentation of an adjudication by this court that there has been a valid divorce decree rendered in Nevada, they will vacate that warrant.

The Court: All you need do is to send over to the court a copy of my opinion, which I am having typed, incidentally, and you show it to them, and say, "This is the opinion of the court in this case." If they want to confirm it, let them call me.

Mr. Winsten: Now, your Honor, if counsel is going to serve a brief on this court, I would like to have it served several days before Monday, January 24th next, which is the date I think your Honor indicated to which you would adjourn this case, so that I shall have an opportunity to file an answer; and that I be furnished with a copy of the testimony——

The Court: A brief as to what?

Mr. Winsten: Counsel has just indicated to the Court that he was going to submit a brief.

The Court: He is talking about a brief on the legal questions he raised on this motion to dismiss the balance of the case.

Mr. Winsten: Whatever it is, I would like to be served with a copy of it and I would like to have time to reply to it, that's all I'm asking.

Mr. Rosenblatt: I think it would be much better for
[fol. 462] everybody concerned, supposing I give your Honor, and serve previously, a brief before the 24th on the

question of what I maintain the standards, if any, should be in the event your Honor takes jurisdiction under 1170-b for all purposes, and I will serve that on him and give him an opportunity to reply, so that this brief will be before you by Friday of next week.

Mr. Winsten: How many days before Friday will I have your brief, that's the point.

Mr. Rosenblatt: I'll give it to you by Wednesday afternoon.

Mr. Winsten: All right; that's all right.

Mr. Rosenblatt: And I will hand it up to your Honor by 4 o'clock on Friday, and that's all that will be touched on in that brief.

(Adjourned until Monday, January 24th, 1955, at 10 a.m.)

January 24, 1955, at 10:00 o'clock A. M.

Mr. Winsten: I should like to offer in evidence an affidavit made by an official of the Hanover Bank, Mr. A. L. Manierre, supplementing his previous affidavits which were also marked in evidence, indicating the trust income in a certain trust administered by the Hanover Bank as trustee. I have given Mr. Rosenblatt a copy of that affidavit this morning.

Mr. Rosenblatt: May it please your Honor, I object to any evidence whatsoever of the defendant's income, assets or possessions, upon the ground that the Nevada de- [fol. 463] cree foreclosed inquiry into such subject matter, and upon the further ground that that is not proper consideration for your Honor under the cases cited in the briefs which we were privileged to submit to your Honor on the general subject matter of the standards applicable in the event that the constitutionality of Section 1170-B is upheld.

The Court: Objection overruled.

Mr. Winsten: I understand that counsel is not objecting as to the form of the evidence, in other words, not objecting that this is not the best evidence, is that correct?

Mr. Rosenblatt: That's correct.

Mr. Winsten: So that there will be no necessity——

Mr. Rosenblatt: I don't dispute this.

Mr. Winsten: You don't dispute the affidavit?
Mr. Rosenblatt: No.

(Received in evidence and marked Plaintiff's Exhibit 28.)

Mr. Winsten: Mr. Rosenblatt, will you concede that if Mr. Manierre were called as a witness he would testify as to the facts contained in his affidavit?
Mr. Rosenblatt: Certainly.
Mr. Winsten: And I refer to Plaintiff's Exhibit 28 in evidence.
Mr. Rosenblatt: May it please your Honor, I note that this affidavit is being marked an exhibit, I think number 28. I think that orderly procedure requires a remarking or a new marking of the exhibits which may be introduced in [fol. 464] this part of the proceeding. I don't believe that they are properly in addition to the exhibits which were offered previously on the question of the validity of the Nevada decree.
The Court: This is a separate issue, of course.
Mr. Winsten: But it is still part of the same case.
The Court: Yes, the same case. We will mark continuing numbers.
Mr. Rosenblatt: May I have an exception, your Honor?
Mr. McCoy: Your Honor, this is a supplemental affidavit to the affidavit of January 10th. It just brings the matter up to date as to the deposits that have been made since the previous affidavit was submitted.
The Court: I notice that you have the income per year, but no total.
Mr. Winsten: That's right, your Honor, but that is not Mr. McCoy's affidavit yet. That is Mr. Manierre's affidavit. I am offering his affidavit now. I now offer in evidence the affidavit of Thomas F. McCoy, the receiver in this action, sworn to on January 24, 1955, supplementing his prior affidavit submitted and marked in evidence, and will counsel concede that if Mr. McCoy took the stand he would testify as to the matters contained in that affidavit?
Mr. Rosenblatt: Don't press me, let me read it.
Mr. Winsten: I certainly will.
Mr. Rosenblatt: I would like to know the purpose of the offer of this affidavit.

Mr. Winsten: The purpose of the offer is to indicate [fol. 465] what assets the receiver now has in possession subject to the order of the Court in this action.

Mr. Rosenblatt: That means the assets that have come into the hands of the receiver since the sequestration in April of 1953, is that right?

Mr. Winsten: That's right.

Mr. Rosenblatt: I mean April of 1954.

Mr. Winsten: Since his appointment.

Mr. McCoy: Actually it supplements pretty much the last affidavit.

Mr. Winsten: I understand that is only the cash assets. There are other assets subject to the control of the receiver that have not been received, I mean that have not been reduced to his actual possession but are actually in his possession, that is, any future distributions from any of these trusts or estates held by the United States Trust Company and the Hanover Bank, such as further distribution of personalty.

The Court: We are going far afield, it seems to me. The only thing I want to consider now is the offer in evidence of this affidavit, that's all.

Mr. Winsten: Well, counsel is trying to limit the effect of it. All I am offering is the affidavit, that's all.

Mr. Rosenblatt: I object to it upon the grounds previously stated, and upon the further ground that the assets of the defendant are not a proper matter of inquiry in this proceeding.

The Court: I will take it.

Mr. Winsten: Does counsel give me the concession that [fol. 466] if Mr. McCoy were called as a witness and testified, he would testify as to the matters contained in this affidavit?

Mr. Rosenblatt: Yes.

The Court: Mark it in evidence.

(Received in evidence and marked Plaintiff's Exhibit 29.)

Mr. Winsten: I would like the record to show that if there is any question about this affidavit Mr. McCoy is in Court. He can be sworn as a witness and I can produce the people who made the affidavits as witnesses.

The Court: There is no question about it. Mr. Rosenblatt indicated that.

JOSEPH A. WEST, recalled:

Direct examination.

Resumed by Mr. Winsten:

Q. Mr. West, you are employed by the United States Trust Company?

A. I am.

Q. You testified previously, have you not?

A. I have.

Q. Now, the United States Trust Company is the trustee of two trusts at this time in which the defendant has an interest, is that correct?

A. That is correct.

Q. One is under the will of Cornelius Vanderbilt, and the other is under the will of Grace G. Vanderbilt, is that correct?

A. That is right.

Q. Now, I want you to give the Court, with respect to the trust under the will of Cornelius Vanderbilt the actual annual income to the defendant for each of the preceding years back to 1948?

[fol. 467] Mr. Rosenblatt: May it please the Court, I object on the ground that this testimony is incompetent, irrelevant, and immaterial, is certainly not proper, not even under this cockeyed statute 1170-B.

The Court: I wouldn't use the word "cockeyed."

Mr. Winsten: If your Honor please, I don't think that any statute of the State of New York deserves to be characterized in the fashion that counsel just has.

Mr. Rosenblatt: May it please the Court, I have a right to use any language I see fit with respect to my characterization of the statute, and I don't think that this Court in equity or in good conscience——

The Court: Just a minute, Mr. Rosenblatt. We are not interested in the issue of what you call it. I think in all propriety there are other terms that you could use to chal-

lenge the constitutionality of this statute or the import or the legality of it, any other term in keeping with the proper trial of a lawsuit, but I don't think that you ought to use that particular word.

Mr. Rosenblatt: I press the objection upon the ground that any injury into the assets or income of the defendant during the period from 1948 to date is not proper in this case, and that such testimony if received is at variance with the rights of the defendant under the Constitution of the United States and under the Constitution of the State of New York.

The Court: Objection overruled.

[fol. 468] Q. Would your please answer that question?

Mr. Rosenblatt: May it please the Court, I would like to ask one question, sir. Is your Honor prepared to rule that had this decree been a New York decree instead of a Nevada decree, that this testimony would be material and relevant on such a proceeding?

Mr. Winsten: I object to counsel's statement. I don't think it has anything to do with this case.

The Court: I don't think that question calls for an answer, because I am not prepared to rule on that question. It is not before me. I have already ruled on the validity of the decree, and I said what I said. This is on another issue based on Section 1170-B, as to whether or not this plaintiff is entitled to maintenance and support, and if so to what extent.

Mr. Rosenblatt: And all subject to an eventual ruling on the questions raised by ourselves as to Section 1170-B?

The Court: Of course.

Mr. Rosenblatt: Thank you, sir.

Q. Would you give us that income, sir?

A. Your question, Mr. Winsten, said, or asked to give you the amount of income paid to Cornelius Vanderbilt during those years?

Q. No. I am going to ask you for the amount of income which the defendant was entitled to receive during those years from the trust of Cornelius Vanderbilt?

A. I cannot give you that. I can give you the figure that the trust produced minus charges plus commissions and

[fol. 469] other deductions from that income, but I cannot give you what he was entitled to because the subpoena asked me to get the gross income for the year and the moneys paid to Mr. Vanderbilt, which I have.

Q. What is the gross income of each year less commissions?

A. I will give you the gross income per year and the income commissions are figured at the statutory rate which I have not figured.

The Court: Why don't you give us the net?

The Witness: The gross or net, either one.

Mr. Winsten: When he talks about net, it may be moneys paid out at the defendant's direction or to other people at his direction. I want to include that.

The Witness: I can give you the gross income.

Q. Give me the gross less commissions. I think that would be the better idea.

A. I shall give the gross income that I have herein my figures without the income commissions.

Q. All right.

A. In 1948, $10,705.27; 1949, $11,429.45; 1950, $12,466.14; 1951, $11,752.03; 1952, $11,705.98; 1953, $12,044.59; 1954, $12,591.56.

Q. Now, what are the commissions that are deductible by the trustee on those amounts?

A. Well, they come to a statutory rate of six per cent on the first two thousand dollars, two and one-half per cent upon the—three per cent on the next ten thousand dollars, and two and one-half——

The Court: Who is going to figure that out, counsel?

Mr. Winsten: I will figure that out, sir.

[fol. 470] The Court: Do you have the figures?

The Witness: No, sir. I have the net figure which includes payment to creditors also, which are much less than this.

Q. I did not ask you about payment to creditors. What we are interested in is the earnings less commissions.

The Court: All right, continue.

Q. Now, with respect to the trust under the will of Grace G. Vanderbilt, when was that trust erected?

A. It was set up on May the 3rd, 1954.

Q. With a corpus of how much?

A. About—it is now valued at 325 thousand dollars.

Q. And what was the yield from the date of its creation in May 1954 until the end of the year of 1954?

A. The annual income credited to the trust for that period from May the 3rd through December 31st, was $6,470.97. In my previous testimony I said the income was about $10,000, which is derived by taking the income from July the 1st, 1954 through December 31, 1954 of about $5,400, and doubling it for the other six months which gives $10,800. This, of course, is gross income.

Q. Subject to the trustee's commissions as you previously testified, six per cent on the first two thousand dollars and three per cent on the next ten thousand dollars?

A. That's right.

Q. The United States Trust Company is also one of the executors of the estate of Grace G. Vanderbilt, is that correct?

A. That's correct.

Q. And you also testified that the defendant in this action as one of the co-executors of that estate is entitled to a [fol. 471] commission which at the present time amounts to about $34,000 as an executor, is that correct?

A. That's about right, yes.

Q. You also testified——

The Court: You mean unpaid commissions?

The Witness: That's right, sir. We don't take that until we finally account and the Court allows all the executor's commissions.

Q. Mr. West, you also testified that this trust that was just created under the will of Grace G. Vanderbilt, the corpus from that will be enhanced by the transfer of additional securities or moneys to that trust, is that correct?

A. Correct.

Q. Are you able to give us an estimate of the amount of corpus by which the trust for the benefit of the defendant in this action will be enhanced?

A. Yes, but as I said before in my previous testimony, I cannot give an exact amount, and it might be changed because we have not completed our New York Estate tax proceedings. We have completed our Federal, which has been increased.

Q. Based upon your present calculations of what the tax should be——

A. The present figure——

Q. ——what would be the amount of the corpus that would be added to the trust for the benefit of the defendant?

A. At the present figure, between 45 thousand and 50 thousand dollars.

Q. And what would be the approximate gross yield on such amounts subject to executor's commissions per year?

A. Well, figuring on a four per cent basis, you have roughly about two thousand dollars more.

Q. Less your commissions?

A. Yes, that's right. That makes a total of $12,800 less commissions, roughly.

[fol. 472] Q. Now, I believe you also testified at the last hearing that there is additional property to be distributed to the defendant from the estate of Grace G. Vanderbilt?

A. That's correct.

Q. Will you tell us what—I withdraw that. Has there been certain property set aside for the defendant as a legatee of the estate of Grace G. Vanderbilt at this time?

A. What do you mean "set aside"?

Q. Has there been any property placed in a warehouse or some such other place in his name?

A. That is delivered to him, correct.

Q. And that is subject to the receiver's and sequestration order?

A. I imagine it is because it must be served upon the warehouse, and I think it was.

Q. Now, can you give us an estimate of that property that is in the warehouse?

A. No, I cannot.

Q. Is there an appraised value of that?

A. There is an appraised value of that property, yes.

Q. Can you give us the appraised value for tax purposes?

A. $107,839. was placed in the appraisal in the Federal Estate Tax return.

Q. And what part of that has been placed in the warehouse in the defendant's name?

A. Well, roughly half of it.

Mr. Rosenblatt: Can we have the date?

Mr. Winsten: What date?

Mr. Rosenblatt: When this was done.

The Witness: I don't have that, Mr. Rosenblatt.

Mr. Rosenblatt: Have you any speculation or idea about it?

The Witness: Well, last Spring sometime.

Mr. Rosenblatt: In the Spring of 1954?

The Witness: I think so, sir.

[fol. 473] Q. Is there any money in the hands of the executors at this time that is subject to distribution to the defendant from the estate of Grace G. Vanderbilt?

A. Well, as you know a trust produced income daily.

Q. I am not talking about the trust. I am talking about the estate.

A. Oh, excuse me. There is some undistributed income in the estate which will be distributed when we account.

Q. And how much is that?

A. Well, I figure roughly about $1,200.

Q. And what part of that is the defendant entitled to?

A. If I remember my figures, $1,200 is his share.

Q. Now, is there any other money that is in the hands of the executors as a result of the sale of personalty? I think you mentioned the figure of about $20,000?

A. That's right. There is a deposit with the United States Trust Company of about $20,000 to take care of any additional estate taxes which might be developed.

Q. That is in the nature of a contingent fund?

A. That's right.

Q. And if it is not expended what part of that would the defendant be entitled to?

A. Depending upon the personalty already delivered, he gets his share, which might be a half, or some place around there, I don't know.

Q. Now, Mr. West, is there anything shown in the inventory of the estate of Grace G. Vanderbilt that there was any gold or silver service?

A. I don't know. We have the appraisals here without going all through them.

Q. Well, I examined the appraisals, the appraisers' reports, the four of them now before you, and I don't find

[fol. 474] any gold or silver service listed in those inventories.

A. Did you check into the supplementary one, Mr. Winsten?

Q. Yes, I did.

A. There are five of them.

Q. You check it, please, and see if you can find a gold service or a silver service?

A. I do remember there was a gold service appraised, but I cannot find it here. I don't know how long it will take. It was in the silver vault in the basement.

(Colloquy between the Court and counsel off the record.)

Q. Did the executors have it?

A. The executors did not have it for tax purposes—yes, they did have, OK, yes.

Q. Do you know what the value of it was?

A. I cannot find it.

Mr. Rosenblatt: Do I understand that the executors had this silver service?

Mr. Winsten: It was a gold service.

Mr. Rosenblatt: Call it whatever you want, but did the executors have it?

The Witness: We had control of it for a while until it was delivered to Major Vanderbilt and his sister, yes.

Q. Was this gold service delivered to the defendant and his sister by the executors?

A. As I remember,—this is all from memory—yes, it was included in the articles that were delivered.

Q. Do you know what the appraised value of that gold service was?

A. I have not found it yet.

Q. When you say "delivered to the defendant," when was it delivered to the defendant?

A. I imagine in 1954.

[fol. 475] Q. Can you give us any better date than that?

A. I'm sorry, I cannot.

Q. Don't your records show a receipt from the defendant when the executors delivered it to him?

A. Of course it shows a receipt, but I have not got that here.

Q. Did you personally have anything to do with its delivery?

A. Directly, yes.

Q. Tell us what you had to do with its delivery?

A. I was up there at the appraisal at 1048 Fifth Avenue, and it was turned over to the two children through our counsel.

Q. And you don't remember when that was?

A. I do not, no. It was since our appointment, of course.

Q. Was it before you got the sequestration order or after you got it?

A. Oh, before.

Q. You got the sequestration order in about April of 1954, did you not?

A. In the Spring, that's right.

Q. And was it delivered prior to or subsequent to April of 1954?

A. Prior to that.

Q. Did you see that gold service, sir?

A. I am quite sure that I did. I am talking from memory now. I was down in the vault and there was so much stuff around——

Q. Don't you know what the appraisal was if you were there when it was appraised?

A. I would say not. No, I don't know.

Q. How big was it, how many pieces was this gold service?

The Court: Are you inquiring here of this witness now what some future use may be made of it, or is it because of this case?

Mr. Winsten: Because of this case.

[fol. 476] The Court: Where is the income from this silver service? Have you proven it was sold?

Mr. Winsten: If your Honor please——

The Court: At best you can prove that it was delivered to the defendant.

Mr. Winsten: That is right.

Mr. Rosenblatt: And his sister, and his sister.

The Court: All right, next question.

Let's get out to some other subject.

Q. What part of it was delivered to the defendant? Was it half of it?

A. It was all totaled together and it was delivered between them. It was not exactly half and half of each item.

Q. But he got a part of it, roughly, half of it, and his sister got half of it?

A. That's right.

Mr. Winsten: That's all, Mr. West.

Cross-examination.

By Mr. Rosenblatt:

Q. Now, Mr. West, tell us what was actually paid Mr. Vanderbilt from 1948 to 1954.

A. In 1948 the net figure to Mr. Vanderbilt was $8,949.74.

Mr. Winsten: That is objected to, if your Honor please, anything about a net figure. I think we should establish where the other money was paid to, if your Honor please.

The Court: If you want to do that, that's your business, not his.

Q. Go ahead, Mr. West.

A. 1949, $8,797.92. 1950, $8,238.09. 1951, $9,117.71. 1952, $8,592.33. 1953, $10,601.22. 1954, $4,671.20.

[fol. 477] Q. There were deductions made from that income on account of judgments rendered against the defendant in the State of New York, were there not?

A. Not against the figures I just gave, no, sir.

Q. Against the gross income?

A. Yes. Those are net figures that I just gave.

Q. In other words, judgment creditors were paid?

A. Yes, sir, they were.

The Court: Is this after you paid judgment creditors and your commissions?

The Witness: That's right.

Q. Do you have any idea as to what the defendant's total net income was during any of those years?

A. You mean outside of ours?

Q. Outside of yours and anybody else, do you know what his net income was during any of those years?

A. No, sir.

Mr. Winsten: I object to the form of the question.

Q. Now, when you say that property was turned over—by the way, these figures which you gave were all subject to the payment of income taxes, weren't they, these gross figures that you gave the other counsel?

A. The income, yes, sir, to him.

Q. They were subject to income tax payable by the recipient, weren't they?

A. Yes, sir.

Mr. Winsten: I don't know that this witness can testify to that, your Honor.

The Court: Let us put it the other way: were those moneys delivered to him tax free?

The Witness: They were not.

[fol. 478] Q. Now, tell us, when you said——

A. May I——

Q. No, you may not. Tell us, when you said the property was delivered over and you had put it in some warehouse—do you remember that? I am not talking about the gold and silver set now, or something of that kind.

A. Yes.

Q. You said it was turned over in the spring of 1954.

A. As I remember, Mr. Rosenblatt, yes.

Q. And do you know whether the defendant has property that you say was turned over? Do you know whether he has it right now?

A. I do not; no, sir.

Q. And do you know whether the so-called silver or gold to which some reference has been made was turned over to the executors at 1048 Fifth Avenue?

A. I think it was put in a warehouse first and then delivered over. I am not quite sure about that.

Q. Do you know when?

A. I don't remember, no, sir.

Q. Could it have been in 1952?

A. No, it could not have been 1952, because Mrs. Vanderbilt died, the mother died on January 7th and we were not

appointed as executors until January 22nd, 1953, so it must have been sometime after our appointment, and the appraisals were completed which had to be made, on May 7th, and we had to get out of that 1040 apartment, so it must have been sometime around that or shortly thereafter.

Q. In the spring of 1953?

A. That is correct, or the summer.

Q. Tell me, Mr. West, in these estimates that you have made of what might still be due, and so forth, that is all subject to a question of the Federal and State taxes, is it?

A. Yes, sir.

Q. And a review of the audits already made?

A. It is subject to more than that. Our Federal and [fol. 479] State tax has been settled, but the New York Estate Tax is in its proceedings now, and we should have a settlement of that soon, but we don't know what is going over to the trust until we account for every penny that we have received and what we have paid out. Then we will know what will go into the trust, because they share in the residue of the estate, and I cannot tell what the residue of the estate will be until we have a regular accounting with figures in it.

The Court: You are talking about the Grace Vanderbilt Estate?

The Witness: Yes, sir.

The Court: That is in connection with the additional $50,000?

The Witness: That is coming from the estate of Grace Vanderbilt.

The Court: That is the only thing you are talking about now?

The Witness: Yes, sir.

The Court: But you have $325,000.

The Witness: In trust, yes, sir. That is where that income came from that I gave testimony before.

Q. Are you familiar with the claim of Mrs. Stevens in the sum of $900,000?

A. No, sir.

Q. You don't know anything about that?

The Court: I don't find Mrs. Stevens here.

Mr. Rosenblatt: Mrs. Stevens is Mr. Vanderbilt's sister.

The Witness: I know her.

Q. Am I correct that she is his sister?

A. Correct, sir.

[fol. 480] Q. Do you know anything about a claim of half a million dollars in favor of a California bank under an assignment given by Mr. Vanderbilt to that bank many years ago?

A. Indirectly, from talking with him, that is all.

Q. You have no other knowledge?

A. No, sir.

Mr. Rosenblatt: That's all.

The Court: All right; step down.

Mr. Winsten: While the witness is coming in, may it please the Court, I would like to offer in evidence my affidavit sworn to on January 21st, 1955, concerning the nature and extent of the services rendered by me in this action in lieu of my testimony on that subject.

Mr. Rosenblatt: Now, first of all, may it please your Honor, I object on the ground that counsel is not entitled to any award of any counsel fees, either under the order of Mr. Justice Rabin or under the provisions of Section 1170-B.

Secondly, I object to this affidavit, since it deals not only with the so-called services rendered in this action, but so-called services rendered outside this action.

Thirdly, it is complete and full of hearsay statements, personal conclusions, and comments by the affiant.

The Court: As I take it, you will not accept the affidavit in lieu of testimony?

Mr. Rosenblatt: I make that very clear, your Honor.

Mr. Winsten: I will take the stand, your Honor.

[fol. 481] Mr. Rosenblatt: May it please your Honor, I object to any testimony on the ground that there is no authority for the award of any counsel fees whatsoever under the determination of Mr. Justice Rabin, who made an award upon the basis as follows——

The Court: I am aware of that, counsel, I read it.

Mr. Rosenblatt: Sir?

The Court: I am aware of what Judge Rabin said. I will take his testimony nevertheless. It does not mean that I am going to give him counsel fees at the end. I may and I may not. Let me ask you gentlemen this, off the record.

(Colloquy between the Court and counsel, off the record.)

MONROE J. WINSTEN, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

(The witness stated that he resides at No. 89 Maple Avenue, Tuckahoe, New York.)

The Witness: I am the attorney for the plaintiff in this action and I have been such attorney for the plaintiff since the inception of this action.

I was admitted to the bar of the State of New York in 1931, and have continuously been engaged in the practice of law in this City since the time of my admission.

Mr. Rosenblatt: May it please the Court, there are counsel [fol. 482] here, and I suggest that the testimony be given not in narrative form, but in question and answer form.

The Court: Do you concede his qualifications as a lawyer?

Mr. Rosenblatt: I concede that he is a member of the bar.

The Court: Go ahead, now, ask him questions.

The Witness: During the course of this litigation——

The Court: He wants it in question and answer form.

Mr. Winsten: Do you want to ask me questions, Mr. Raskin?

Direct examination.

By Mr. Raskin:

Q. Mr. Winsten, did you have to engage the services of another attorney in connection with the litigation of this case?

A. Yes, I did.

Mr. Rosenblatt: May it please the Court, I object to that upon the ground that he is the attorney for this plaintiff, and whether or not he had to retain counsel besides himself is certainly not attributable to any obligations supposedly on the part of the defendant. He might have retained fifteen lawyers. What has that got to do with this?

The Court: Except that I will take it for the purpose of indicating the amount of expenses involved in handling this case, just like the paying of rent, the engaging of stenographers——

Mr. Roseblatt: On that basis, if he hired three other

lawyers, is the defendant to be chargeable with these three other lawyers?

[fol. 483] The Court: No, except that part of his expenses would be an item that I would have to consider in determining what his fee would be.

Mr. Rosenblatt: I never knew that expenses bore any relationship to a lawyer's fee.

The Court: In handling a legal matter?

Mr. Rosenblatt: That's right. Disbursements are one thing, your Honor, but expenses are quite another.

The Court: I will let him answer.

Q. What is your answer?

A. My answer is yes.

Q. And with respect to the employment of this attorney, his name is Charles L. Raskin, the speaker?

A. That is right, yourself.

Q. Did you employ Mr. Raskin as a matter of routine or because of special circumstances prevailing in this particular case?

Mr. Rosenblatt: That is a conclusion, your Honor, and I object to it.

The Court: Objection sustained.

Q. And what services did Mr. Raskin render in this case in connection with the litigation and motions?

Mr. Rosenblatt: I object to that, your Honor.

The Court: Objection sustained. Is it your services or Raskin's services that you are asking to be paid for?

The Witness: It is my services except that I had to be assisted by somebody.

[fol. 484] Mr. Rosenblatt: Now, your Honor, I move to strike out that statement that he had to be assisted by someone.

Q. Did you have a disbursement as a result of the employment of Mr. Raskin?

A. I did.

Q. And what was the amount of it, up to date?

A. $775.

Q. You paid Mr. Charles L. Raskin out of the funds that you received, the $2,500 allowance, $775, is that correct?

A. I did.

Q. Now, I refer you now to the preliminary preparation and research. Will you tell the Court the necessity of it and what it consisted of?

Mr. Rosenblatt: May it please the Court, I object to this upon the ground that that certainly is not any charge binding as against the defendant in any way, shape, form, or manner.

The Court: How is he to establish the services and what he did in connection with this lawsuit unless he tells us what he did do?

Mr. Rosenblatt: Let him tell us what he did in this lawsuit, in this lawsuit.

Mr. Raskin: I withdraw the question and I will ask the question this way:

Q. Will you tell the Court what services you rendered in this case?

A. Well, the plaintiff first consulted me to place the facts before me and in contemplation of this action it was necessary for me to ascertain all of the facts that were available in order to determine whether there was a cause of action or what the nature of the action would be.

[fol. 485] Mr. Rosenblatt: May we have the date, your Honor?

The Witness: I would say it was in the latter part of March or the early part of April.

Q. What year was that?

A. Of 1954.

Q. Would you address yourself now——

A. During the course of my interviews with the plaintiff I discovered that there had been some prior proceedings in this court, that there had been prior proceedings in the Court of Domestic Relations of the City of New York.

Q. Continue, please.

A. There had been a previous separation action in this court and also a proceeding under Article 78 of the Civil Practice Act, brought by the defendant against the Justices

of the Court of Domestic Relations, also brought in this court.

In the previous separation action there was extensive testimony before an Official Referee which was almost a thousand pages of testimony, I believe, and there was additional testimony in the Court of Domestic Relations. Now, in order that I might be properly aware of all of the facts in the case, it was necessary for myself, with the assistance of Mr. Raskin, to examine all of the papers and the transcripts of the testimony in all of the previous proceedings.

The papers, aside from the testimony, the affidavits and papers were several hundred, I believe, and the testimony in both the Article 78 proceeding—not in the Article 78 proceeding, but in the Court of Domestic Relations, and in the hearings before Referee Lazar, were over 1,000 pages, and Mr. Raskin and I had to closely examine all of [fol. 486] these papers and make an analysis of the statements contained in the testimony, and the papers, in order to evaluate the factual situation of the plaintiff's rights under the law.

Besides an examination of the court records and testimony, both Mr. Raskin and I made an extensive research of the existing law pertaining to the situation, various decrees, various ex parte decrees, and that examination of the law included not only the New York Law, but the decisions of the United States Supreme Court and the English cases and the decisions in the various states of the United States, because ever since the advent of the case of Williams against North Carolina—that is, the second Williams case—there has been a substantial revision of the judicial——

Mr. Rosenblatt: May it please the Court, I move to strike that out, I am interested in what he did.

The Court: Just tell us what you did.

A. (Continuing) In addition to that, the extensive examination was required because of the fact that there now was involved——

Mr. Rosenblatt: May it please the Court, I am not interested in why. I only want to know what he did.

The Witness: Well, Section 1170-B of the Civil Practice Act was a comparatively new statute.

Mr. Rosenblatt: May it please the Court, I move to strike that out.

The Court: I will let it stand. Go ahead.

A. (Continuing) As a result of the fact that that [fol. 487] was a new statute, I was obliged to make exhaustive studies of the background of the statute and the decisions that preceded it, and upon which that statute was based. Now, after that, after our examination of the law and the facts in the previous proceedings, and extensive conferences with the plaintiff, I then prepared a summons and complaint. The complaint I believe was about eight pages.

After the preparation of the summons and complaint it was then necessary for me to conduct an investigation in order to find out where the defendant was. By reputation he was not supposed to be——

Mr. Rosenblatt: May it please your Honor, I am not interested in the reputation.

The Court: Strike that out.

A. (Continuing) According to my information the defendant was not in the City or in the State of New York. The only way that this Court could have jurisdiction over the defendant or jurisdiction over an action for separation brought by this plaintiff, would be service of the summons by publication and sequestration. The service of the summons——

Mr. Rosenblatt: May it please the Court, of course that is a conclusion and I move to strike it out.

The Court: Strike it out.

A. (Continuing) Well, in my opinion——

Mr. Rosenblatt: May it please the Court, I am not interested in counsel's opinion.

[fol. 488] The Witness: As a basis of the work that I performed, your Honor, I believe that I should advise the Court——

The Court: Tell us that the defendant was not available to you and you had to do this, that, or the other thing.

A. (Continuing) I caused an investigation to be made in order to discover whether or not the defendant was within the State.

As a result of that investigation, I found that the defendant could not be found within this State.

I was then obliged to prepare papers for sequestration of the defendant's property within the State of New York.

Now, the papers for sequestration consisted of an order and affidavits. The order I believe was five typewritten pages and the affidavits consisted of 24 typewritten pages. Great pains and care were required in the preparation of these papers, because of the fact that strict compliance with the statute was required.

In addition to that I prepared the papers for the publication of the summons. These papers also were prepared with great care, and consisted of an order and affidavits, all of which were approximately 18 typewritten pages.

After the granting of the publication and sequestration orders, I then proceeded to communicate with Mr. McCoy, who was the receiver and sequestrator appointed under the sequestration order, of April 21st, 1954, and conferred with him both personally and on the telephone on several occasions, and the subject of our discussions was to discover the defendant's property within this State and the acquisitions by this receiver of that property, or the subjection of that property to his control.

[fol. 489] As a result of our conferences and letters and communications the receiver did acquire possession of income, trusts, and I believe there were three trusts at that time, and also property distributable to the defendant under the will of his mother, Grace G. Vanderbilt, which is still subject to the receiver's control.

Mr. Rosenblatt: If your Honor please, I move to strike out everything in connection with what the receiver did. The receiver also had counsel, and certainly what the receiver did or what the receiver's counsel did has nothing to do with this claim.

The Court: I will take it as indicating the result of his work.

Mr. Rosenblatt: Is counsel claiming that he is responsible for what the receiver did?

The Court: Except that the result of making the application for the order, it was granted, and that the receiver was also appointed and what was accomplished.

Mr. Rosenblatt: But not by this witness your Honor.

The Court: I understand.

Mr. Rosenblatt: By the receiver.

A. (Continuing) I conferred with the receiver prior to the appointment and his retention of counsel, and I devoted time to an effort in conjunction with the receiver's efforts, prior to the appointment of his counsel.

Mr. Rosenblatt: I move to strike that out, your Honor.

The Court: I will let it stand.

[fol. 490] Q. Was it necessary for you to talk to the receiver, Mr. McCoy, from time to time?

A. Yes, it was.

Q. Did you see him personally on occasions?

A. Yes, I did.

Q. And did you talk to him on the telephone on occasions?

A. Yes, I did.

Q. And how often did that take place since the inception of this action, approximately?

A. Well, I would say during certain periods it might have been several times a day. At other periods it might have been once or twice a week, and in other periods nothing even during a month.

Q. Did it become necessary to determine whether or not the receiver should physically take possession into a separate bank account of the moneys accruing from these trusts?

A. Yes, that question arose.

Mr. Rosenblatt: I object, your Honor. What this witness had to do with the activities of the receiver is beyond me, sir.

The Court: Let's find out what they had to do with it.

A. (Continuing) When the receiver was first appointed the banks suggested to the receiver that instead of transferring the moneys actually to an account——

Mr. Rosenblatt: May it please your Honor, this witness is now testifying about what banks suggested to the receiver.

The Witness: This was the subject of my conversations with Mr. McCoy.

Mr. Rosenblatt: I don't think the defendant is liable [fol. 491] for his conversations with Mr. McCoy, who is going to ask for money in the sequestration proceedings and an allowance for a counsel fee as well.

The Court: Go ahead, counsel.

A. (Continuing) Prior to Mr. McCoy's retention of counsel I conferred with Mr. McCoy on the subject of whether or not the moneys sequestrated by the receiver should actually be transferred to him in an account under his name or whether or not the banks should merely earmark the defendant's accounts as being subject to the sequestration.

As a result of several conversations between myself and the receiver, Mr. McCoy decided to request a specific order of the Court, directing the banks to turn over the money to an account in his own name.

Q. Did you in connection with these conversations have a conference at the chambers of one of the justices of this court with respect to the subject of the seizure of the money?

A. I did. I had a conference at Mr. Justice Hecht's chambers in connection with that order.

Q. Address yourself now to the details with respect to the perfection of service through publication. You mentioned the order but you did not continue with respect to the next steps.

A. Well, after the order of publication was signed, I then retained an advertising agency to have the summons and notice published, and the publication proceed, and at the same time I mailed, personally mailed a copy of the summons and complaint and the notice required by the rules of Civil Practice to the defendant.

After the service of the publication was completed——

Mr. Rosenblatt: Can we find out where he mailed it? He said he mailed something.

[fol. 492] The Witness: Yes, I mailed something in the Church Street Annex.

Mr. Raskin: Do you want to ask him a question?

Mr. Rosenblatt: I want to understand from his testimony what he did. He said he mailed something.

The Witness: I will answer that question, Mr. Rosenblatt. I personally mailed the papers required to be mailed in the order in the Church Street Post Office on the date specified in my affidavit of mailing, which is on file in this court.

Q. In connection with this phase of the case——

A. Now, after the publication and mailing were completed——

Q. Did you have a disbursement with respect to the publication?

A. Yes, I did.

Q. Did you pay the agency $189.20?

A. I did.

Q. And that also was paid out of the $2,500?

A. That is right.

Q. Proceed.

A. The publication required publication in two newspapers once each week for six consecutive weeks.

The Court: We know all that. You complied with the requirements.

The Witness: That is right.

The Court: Go ahead.

A. (Continuing) After that I prepared and signed an affidavit of mailing and filed a proof of publication.

Now, after the publication had commenced the defendant's counsel served a notice of special appearance and [fol. 493] demanded the service of all papers in the action. That took place sometime in May, I believe, the early part of May. Immediately following that and on May 4th,——

Q. Did you comply with that demand?

A. I did, sir. A representative of Mr. Rosenthal's office came down to my office, and I delivered to him copies of the publication and the sequestration papers against his receipt for it.

On May 4th, 1954, Mr. Rosenblatt's office served a motion returnable six days later, on May 10th, 1954, in which he sought to vacate the orders of sequestration and publica-

tion, and he sought a dismissal of the complaint on the grounds that the Court lacked jurisdiction of the defendant's person and the subject matter of the action, and on the further ground that the defendant's rights under the Constitution of the United States had been violated by the maintenance of this action and the granting of the orders of sequestration and publication.

The papers that were served by defendant's counsel on my office on May 4th consisted of approximately 22 pages of affidavits and exhibits.

Q. That included also a motion to vacate the order of publication, did it not?

A. I said that, yes.

Q. I did not understand so.

A. And thereafter the defendant's counsel served on the return date of the motion, a brief supporting his motion, and after the argument of the motion he served an additional brief or reply brief.

Now, both of those briefs, one brief consisted of 16 pages containing the citation of at least 22 cases, and the second brief was 20 pages, citing more than 25 cases.

Although we only had a six day notice of motion, I felt [fol. 494] that this motion was too important to be adjourned and that it should be heard as quickly as possible and I did not request any adjournment on the motion.

Mr. Rosenblatt: Now I move to strike that statement out, your Honor.

The Court: Objection sustained; strike it out.

A. (Continuing) We had a six day notice of this important motion and I did not request an adjournment.

Mr. Rosenblatt: I move to strike that statement out.

The Court: Strike it out.

Q. I will ask you a question.

A. Between the date of service of those papers on May 4th and the return date of the motion on May 6th, Mr. Raskin and I devoted practically all of our working time to the preparation of the necessary answering papers and briefs. The time was short——

Mr. Rosenblatt: I move to strike out "the time was short."

The Court: Strike it out.

Q. Did the services rendered by you and by your associate, Mr. Raskin, during this study of the papers and so forth on the motion to dismiss include any night work?

A. It did, every night between May 4th—almost every night, I would say, with the exception of possibly a Sunday night, between May 4th and May 10.

Q. Very well; proceed.

[fol. 495] Mr. Rosenblatt: May it please your Honor, I previously requested that this proceed by question and answer form. Now I ask that it continue in that fashion.

The Court: Can you put another question to him?

Q. You were now telling the Court about this motion to dismiss the action and to vacate the various orders.

A. I submitted answering affidavits in opposition to this motion. These affidavits consisted of approximately 19 typewritten pages and briefs were submitted on behalf of the plaintiff, a brief was submitted on behalf of the plaintiff which comprised approximately 22 pages.

The decision by—I withdraw that.

I appeared in court on May 10, 1954, at Special Term, Part III, before Judge McNally, and argued the motion, that is, argued the opposition to the defendant's motion to dismiss.

Q. May I ask you a question at this point: with respect to the preparation of the affidavits in opposition and the briefs in opposition, would you inform the Court whether this was just an ordinary, perfunctory motion, a routine motion, or was it extraordinary, requiring arduous efforts and substantial research?

Mr. Rosenblatt: May it please your Honor——

The Court: Objection sustained to the form of the question. Tell us what you did.

The Witness: This motion——

Mr. Rosenblatt: There is no question before the Court, your Honor.

[fol. 496] Q. Will you state, will you inform the Court as to the nature of the work you had to perform with Mr. Raskin in order to prepare the papers and briefs in opposition to this motion?

Mr. Rosenblatt: May it please your Honor, it is already testified to. They worked every night except Sunday night, and all of the days in between.

The Court: Did you do anything else?

The Witness: Yes.

The Court: Go ahead.

A. (Continuing) The questions raised by the defendant's motion were questions of constitutionality of Section 1170-B. It required more than a perfunctory examination of the law already researched up to that time.

It was then necessary for me to inquire further into the questions of constitutionality, decisions by the United States Supreme Court, and the decisions of the courts of our own States on the questions of constitutionality of the statute, and I also inquired into the report of the Law Revision Commission which had recommended the enactment of this legislation on the question of constitutionality and by reason of the challenge of constitutionality, the research and the preparation for the opposition to this motion was rendered more onerous and extensive, and also by the fact that it was a new statute that we were dealing with.

Now, the motion made by the defendant was denied by Judge McNally, and the defendant was directed to serve an answer to the complaint.

Q. You attended the court on the argument of that motion before Mr. Justice McNally?

A. I did.

Q. And you personally argued it?

A. I did.

[fol. 497] Q. And was Mr. Raskin present alongside of you in connection with the argument of that motion?

A. He was.

Q. For whatever assistance might be required of him?

A. He was.

Q. Proceed.

A. Thereafter I prepared a motion for temporary alimony and allowance of counsel fees to the plaintiff for the prosecution of this action.

This motion was made returnable on July 6th, 1954, before Mr. Justice Rabin. The motion papers comprised 58

pages of affidavits and exhibits and a memorandum of law comprising 13 pages.

In opposition to this motion the defendant submitted affidavits and exhibits consisting of approximately 30 pages, and a brief consisting of approximately 22 pages.

The motion was decided by Judge Rabin, who denied temporary alimony, without prejudice, reserving that question for the trial court.

Q. Did that order that was entered by, or signed by Mr. Justice Rabin, have a provision that the allowance of counsel fees shall be without prejudice to review at the trial of this cause of the nature, extent, and reasonable value of the services here rendered and hereafter to be rendered by the plaintiff's counsel in this action, and to the making of an additional allowance further if at that time the Court deems it proper? Was that the order that was entered?

A. That was correct.

Mr. Rosenblatt: I move to strike out the question, your Honor, and I move to strike out the answer, on the ground that the order and the opinion speak for themselves, besides which there was more to it than what is said in here.

[fol. 498] The Court: That's the basis of his application now, and that is what he is testifying to.

Mr. Rosenblatt: I take it that I have a right to cross-examine him with respect to the order of Mr. Justice Rabin?

The Court: Yes.

Q. Now, continue, Mr. Winsten.

A. In addition to opposing that motion, the defendant made a cross-motion for a prior and separate trial of the issue of the bona fides of the defendant's domicile in the State of Nevada on which he procured a Nevada divorce decree on June 30th, 1953.

This motion was also opposed and resulted in a denial of that motion by Judge Rabin.

Q. You had to prepare a memorandum of law in connection with it together with an affidavit in opposition?

A. I believe so, yes.

Now, there were appeals taken from both those orders by both the plaintiff and the defendant, for which I am making no request for any allowance at this time, since a

separate allowance was granted by this Court for the appeals.

Now, thereafter a motion was made by me, returnable on October 19, 1954, for an order to examine the defendant before trial as an adverse party.

That motion was opposed by the defendant, and in opposition the defendant submitted answering affidavits consisting of approximately 18 typewritten pages and a memorandum of law—I withdraw that, I made an error.

My notice of motion and my affidavits comprised 18 typewritten pages, and I submitted a memorandum of law comprising 8 typewritten pages.

[fol. 499] The defendant interposed answering affidavits comprising nine typewritten pages.

That motion was granted in part by Mr. Justice Benvenga. We sought an examination on several items which included the question of domicile of the defendant in Nevada prior and subsequent to his obtaining of his decree of divorce on June 30, 1953, and the defendant's financial condition and the amount of his income and assets, and we sought that examination as an oral examination in this court.

The order of Judge Benvenga excluded inquiry into the defendant's finances at that time, and granted a limited examination with respect to the defendant's domicile, limiting it to facts occurring, facts and events occurring on and after March 5th, 1953, or, I believe he did not mention the date, he merely mentioned the month of March, 1953, and directed that such examination he had on written interrogatories to be settled at a subsequent date.

I then moved for a re-argument and reconsideration of that motion on the ground that examination of the defendant's domicile, which involved the question of intent, on written interrogatories was inadequate, and would be a fruitless effort at best, since it was difficult to determine the question of the defendant's intent through the means of written interrogatories. I moved for a re-argument of this motion, which was returnable on November 24, 1954, and this motion was also vigorously opposed by the defendant.

On December 9, 1954, Judge Benvenga made an order

modifying his previous order to this extent: the plaintiff was authorized to proceed by written interrogatories; or, if the plaintiff could establish that the defendant was within [fol. 500] the jurisdiction, a further application could then be made on such proof for an oral examination of the defendant on that subject.

Q. When you said jurisdiction, you mean within the City of New York—the State of New York?

A. The State of New York. It was further modified that in the event that it should subsequently be determined that inquiry as to defendant's residence and domicile prior to March, 1953, became relevant or material, that a further application could then be made upon such showing for inquiry into the defendant's domiciliary facts prior to March, 1953.

Now, sometime in November of 1954 I served a note of issue for the January, 1955, term, and I believe the fee there was $25, the filing fee; and I also at the same time prepared and served a notice of motion and affidavit requesting a preference in the trial of this action under Rule 9 of the Special Term Rules of this Court.

That motion was granted, and this case was set for the ready day calendar of January 3, 1954.

Now, between the latter part of November and January 3, 1955—I said previously 1954, I meant January 3, 1955—I proceeded to prepare for the trial of this action, and both Mr. Raskin and I devoted a greater part of the month of December, 1954 for the preparation for the trial, which included an exhaustive review of all of the law that we had previously examined, and also additional law for additional points of law that might be raised by the defendant in connection with this action, and also in connection with the defense of the Nevada divorce decree.

I did not mention previously, but I should do it now, that sometime in the early part of July, 1954 the defendant [fol. 501] served an answer which contained two affirmative defenses besides his denials. The answer was an extensive one, consisting of approximately ten or more pages, in which the Nevada divorce decree was pleaded.

Mr. Rosenblatt: May it please the Court, the answer is before the Court and it speaks for itself.

The Witness: All right.

A. (Continuing) However, the defendant indicated on the cover and "wherever he denominated himself as the attorney for the defendant, that he was still appearing especially for the defendant.".

Now, in preparation for trial, in addition to the review of the law and further investigation into the law, I had several prolonged conferences with the plaintiff in order to develop the facts and the testimony that was going to be adduced on the trial.

I also made additional investigations concerning the defendant's property and assets, including communications with the receiver, the United States Trust Company, and the Hanover Bank, inasmuch as that testimony would be relevant and would be produced at the trial with respect to the defendant's income and property.

We were also obliged to re-examine all of the affidavits and the testimony in the prior proceedings which we had examined once before in March or April of that year, and also in preparation for the trial we did prepare several trial memoranda which have been submitted in advance of the trial and during the course of the trial, which at this point I believe amounted to 32 typewritten pages.

Now, on January 3, 1955, this action appeared on the [fol. 502] ready day calendar of this Court and it appeared on each day calendar for the rest of the week, and I attended in Court each morning, on the third, fourth, fifth, sixth and seventh.

On January 7, this action was assigned to Special Term Nine, that was a Friday, I believe, and the trial proceeded on January 10.

The trial continued on the tenth—I believe on the tenth it was a half a day—and then on the eleventh, twelfth, thirteenth and fourteenth, at which Mr. Raskin and I were in attendance every day.

On the fourteenth of January the trial was then adjourned to the 24th of January, which is today, and was resumed today.

Now, on January 19th, 1955 the defendant served an

additional brief which was required to be answered by January 21st. Between Wednesday of January 19 and Friday of January 21 it was necessary for us to devote most of the working time in order to re-search the law on the subject and in order to prepare a brief to be filed with this Court on the 21st.

Such brief was filed, and most of the time between the time we were served with the brief and the time of this filing was devoted to that brief, and when I say, "time" I mean to include myself and Mr. Raskin.

Since the inception of this action in April of 1954 it is my estimate that there were telephone calls either made or received by me in connection with this action on practically every business day, and very often there were several telephone conversations in a single day, and a conservative estimate of the number of telephone conversations had, either made or received by myself or Mr. Raskin in connection with this case, would exceed 500.

[fol. 503] Since the inception of this action there were more than 75 separate pieces of correspondence which were either sent by me or received by me pertaining to some phase of this litigation.

During the month of November 1954 the plaintiff, having been denied alimony pendente lite, she was without funds and was unable to pay her hotel bill, and she was——

Mr. Rosenblatt: May it please the Court, I don't think that has anything to do with this action or services rendered in this action. If he had rendered other services outside of this action to the plaintiff, well and good, but I submit it is not a matter of consideration for this Court.

The Court: What about that, counsellor?

The Witness: Well, it is all pertaining to her support and maintenance, if your Honor please.

The Court: But, it has nothing to do with this case.

The Witness: If your Honor rules it is excluded, I will abandon this part of it.

Now, in connection with this action I made the following disbursements:

Publication of the summons——

(At this point there was a short recess.)

(*After recess.*)

Direct examination resumed.

By Mr. Raskin:

Q. I show you a paper marked Schedule A, and ask you what that represents?

A. Those are the actual out-of-pocket disbursements that I made in connection with this action.

[fol. 504] Mr. Rosenblatt: Give me the total.

The Witness: Totalling $1,166.85.

Q. And if I asked you whether each one of those disbursements was made, what would your answer be?

A. They were.

Q. And they total how much?

A. $1,166.85.

Q. And you paid that out of the $2,500?

A. Yes.

Mr. Raskin: I offer this in evidence.

Mr. Rosenblatt: I have no objection.

(Received in evidence and marked Plaintiff's Exhibit 30.)

Q. Mr. Winsten, I show you a paper marked Schedule B. Will you tell the Court what that represents?

A. Well, Schedule A represents the actual disbursements that I made for specific items; and Schedule B represents what I estimate at a conservative figure to be the stenographic parts for the purposes of the various papers and drafts of papers in connection with this action, and my estimated cost of those stenographic services is $200, and I figured on the low side; and my estimate of the telephone charges in connection with the telephone calls made is approximately $50.

Mr. Rosenblatt: I object to all these items, your Honor, upon the ground they constitute part of a lawyer's overhead.

Q. Did this $250 include all the items of overhead incurred by you?

A. No, it did not.

Mr. Raskin: I offer this paper in evidence.

[fol. 505] Mr. Rosenblatt: He has already testified to it. I object to the paper.

The Court: Yes, he has testified to it.

Q. I call your attention, Mr. Winsten, to item eight in the affidavit that you conferred originally, and will you read that and tell me whether it refreshes your recollection as to one phase of the case——

Mr. Rosenblatt: May it please your Honor, there has been no testimony—I ask that the witness not look at the paper and be questioned.

The Court: What is that? Is that his affidavit?

The Witness: It is my affidavit that I prepared myself.

Mr. Rosenblatt: There has not been any testimony that his memory needs refreshing so far, your Honor.

The Court: Find out if he can tell us independent of what he said in his affidavit. Then if he cannot, let him say so.

Mr. Raskin: I withdraw the question.

Q. Mr. Winsten, would you inform the Court whether from the nature of the work that you had in this case—question withdrawn. Did you have in your practise separation actions representing either a plaintiff or a defendant?

A. I did.

Q. Prior to this one?

A. I did.

Q. And how many years have you been practising?

A. About 23 years, approximately.

Q. And will you inform the Court whether this particular action with respect to which you are giving testimony, [fol. 506] would you say that would be just an ordinary separation action, or would it require an unusual amount and an inordinate amount of time and energy in the performance of the work on behalf of your client?

The Court: Objection sustained to the form of the question.

Q. Have you received any moneys of any nature whatsoever from the plaintiff?

A. No, I did not.

Q. Have you any agreement whereby she has under-

taken in any manner, shape or form to give you any money out of any moneys that she might get in the future or that she might acquire in the future?

A. None whatsoever.

Q. And the only compensation that you are going to get is what you already have received and what you are now seeking on this application?

A. That is true.

Q. What is the amount that you consider is the reasonable value of the services rendered by you in this action?

A. $25,000 for the work heretofore done and the work that may hereafter be required to be performed in the continuance of this action and the completion of it.

Q. This statement that you just made does not include the work that you have already done in connection with the appeals, does it?

A. No, I specifically said that is excluded.

Cross-examination.

By Mr. Rosenblatt:

Q. What is your arrangement, if any, with Mr. Raskin?

A. My arrangement with him is that I will compensate him in a reasonable amount for the time he expends in assisting me in connection with this action.

[fol. 507] Q. And what is your arrangement with the plaintiff about disbursements?

A. I have no arrangement with the plaintiff about disbursements. Any disbursements that are incurred are my own responsibility. I can only look to what allowance the Court gives me for those disbursements.

Q. Did you take this case agreeing with the plaintiff that you would be responsible for the disbursements?

A. I did not discuss the question of disbursements. The plaintiff had no money whatsoever to give me, so I could not discuss the question of disbursements, and I took the case and accepted it upon the understanding that I would have to obtain any allowance for disbursements or counsel fees at the hands of the Court.

Q. Did you discuss with the plaintiff her liability for disbursements?

A. I did not.

Q. When did the plaintiff come to see you?

A. I believe it was some time in the latter part of March or the early part of April.

Q. Had you then seen Mr. Raskin before she came to see you?

A. Mr. Raskin is in my office.

Q. Had you discussed the case with Mr. Raskin before she came to see you?

A. Discussed the case?

Q. Yes.

A. No.

Q. You discussed the case with Mr. Raskin later after you had seen the plaintiff?

A. Yes, that's right.

Q. You say that the plaintiff gave you the facts and that in the course of the interview that you had with her the question of previous proceedings and the previous affidavits and papers came into the discussion?

A. That's right.

Q. And then you proceeded to review all those papers?

A. That's correct.

Q. Now, did the plaintiff tell you that on or about the [fol. 508] 6th or 9th of June—whichever was the date that she testified to—she had been served with an action for absolute divorce emanating from the Nevada Court?

A. Well, I——

Q. No, no, just answer yes or no. Did she tell you that?

A. If you will permit me I will answer the question.

Mr. Rosenblatt: No, your Honor. I ask him to answer yes or no, did she tell him or didn't she tell him?

The Witness: When did she tell me that?

Q. When she saw you and gave you the facts?

A. I cannot recall whether she told it to me when she first saw me or I subsequently learned it, but I did learn it at sometime, about the time the action was started that there had been such a paper served on her.

Q. Did you learn it before you prepared the summons and complaint in this case?

Mr. Raskin: I object to that on the ground it is incompetent, irrelevant and immaterial.

A. It may have been I may have known about it, yes.

Q. Didn't you know about it?

A. I may have known about it at that time, yes.

Q. Didn't you tell his Honor that you had gone lengthily into what had happened in previous proceedings?

A. Now, I know that I knew about it. I am trying to recall when I acquired knowledge of it. Now, it may have been—I was aware of the fact that the defendant claimed he had a Nevada decree, if that's what you mean.

Q. No, no. I want to know whether you were told by the [fol. 509] plaintiff, or you found out before the commencement of this action, that the plaintiff herself had been served in New York with process in the Nevada Court?

A. I believe I knew about it.

Q. And you say that you read the hearings and transcript of testimony that had taken place before Referee Lazar?

A. I did.

Q. And that was before you prepared the summons and complaint?

A. Some of it—I did not read all, but I had read some of it before, and I completed the balance of it possibly later, and I had to read some of that testimony right here in the County Clerk's office because I did not have access to a copy of it.

Q. Didn't you read before you commenced this action the report of Referee Lazar?

A. I did.

Q. And didn't you read the order of Mr. Justice Greenberg?

A. I did.

Q. And were you aware of the findings of the Referee?

A. I was.

Q. And when you testified this morning that you made an analysis of the plaintiff's rights under the law, that was your analysis made before the commencement of the action, wasn't it?

A. Yes.

Q. And you said that you engaged in an extensive research of law, that you read the law on foreign ex parte decrees?

A. That's right.

Q. And decisions of the United States Supreme Court?

A. That's right.

Q. And you said English cases?

A. That's right.

Q. Now give us one English case?

A. One English case?

Q. Just one.

A. If I had my work papers here I would.

Q. Don't you have your work papers?

A. No, not my notes. I did not cite any English cases in any of my memoranda because the English cases are not in [fol. 510] accordance with the laws of the State of New York, but I did read English cases on the subject because references were made in the historical development of the law of alimony, and references were made in the course of the decisions that I read in the historical development of the law on alimony, and in certain instances I referred to those English cases to see what those decisions provided.

Now then, the English law does not conform to the laws of most of the States in the United States, because in the State of New York we do not adhere strictly to the English law, and furthermore the statutes in our State have qualified the law of alimony to such an extent that the English law is inapplicable to our law.

I also read Massachusetts cases too, which more closely conform to the English law on this subject.

Q. And you also said that you read various decisions of the different states?

A. I did.

Q. Now you also read the Essenwein Case, didn't you?

A. I did.

Q. You cited that case to his Honor in your brief filed here last Friday?

A. I did.

Q. And in the Essenwein Case had you read that before commencing this action?

A. I must have.

Q. Well, would you tell his Honor briefly the facts in the Essenwein Case?

A. If you can give me the Essenwein Case, I will give it to you.

Q. Here it is, in the Supreme Court of the United States, 325 U.S.

The Witness: I must state this to your Honor: That I am going to object to the question on the ground that this is in the form of an argumentation to the Court on the law, rather than a cross-examination of me on my services.

[fol. 511] Mr. Rosenblatt: No, your Honor. It goes to the question of the value of the services.

The Court: For that purpose I will take it.

A. Well, in this case the parties were married in the State of Pennsylvania in 1899, and separated in 1919, and continued to live there.

The wife, who was the respondent, obtained a support order in the Pennsylvania court, which was modified from time to time.

Twice the petitioner sought a divorce in Pennsylvania and failed.

In 1941 he went to Nevada, arriving in Las Vegas on June 23. Six weeks later, promptly within the minimum period allowed by the Nevada Law, he there filed a suit for divorce, which was granted on September the 8th.

Shortly thereafter, and in October, he left Nevada and took his residence in Cleveland, Ohio, where he made his home.

On February 1, 1943, the petitioner filed an application in the County Court of Alleghany County, Pennsylvania, for relief from the support order. He did so on the basis of the decision of Williams against North Carolina.

Exemplified copies of the Nevada proceeding with other relevant evidence was submitted to the County Court, which after argument denied the application.

This decision was affirmed by the Superior Court on the ground that the petitioner did not have a bona fide domicile in Nevada when he obtained his decree. This was sustained by the Supreme Court of Pennsylvania.

I just stated the facts.

[fol. 512] Q. You were aware of that case prior to the commencement of this action, were you not?

A. I was.

Q. And when you researched the law, you have testified, and did that extensively thereafter—oh, by the way, you also before bringing this action looked into the background of this statute, 1170-B?

A. I did.

Q. Is it a fair statement that before you brought this action you made a complete, thorough investigation of the law which might apply in this case?

A. That is a fair statement.

Q. And based upon your research into the law you then prepared the summons and complaint, is that right?

A. That's right.

Q. And then you prepared papers and affidavits for sequestration, is that right?

A. That's right.

Q. Now, tell his Honor why didn't you tell the Court in the preparation of those papers that you filed in this court that there was a divorce decree rendered in the State of Nevada on June 30, 1953, in favor of the defendant divorcing the plaintiff?

Mr. Raskin: I object to that, your Honor, on the ground it is incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Rosenblatt: May it please the court, I think it is highly relevant. I take the following position, and may the record show it:

That had the plaintiff disclosed to this Court the existence of the Nevada decree, this case could not have taken the period of time either on the preliminary applications testified to by plaintiff's counsel, or before your Honor, and I state that upon the basis of the fact that had the exist-
[fol. 513] ence of that decree been disclosed to the Court, and in conformity with the cases researched by plaintiff's counsel, the burden of attacking that decree resting upon the plaintiff, there could have been no allowance in the first place of any counsel fees under Harris v. Harris for any purpose, because it was due to the failure of the plaintiff

to tell this Court the truth that it was then necessary to make a motion and then to put in his answer, and the allowance of counsel fee was for the purpose of defending against a defense.

Had the plaintiff made the disclosure to this Court, none of this work, labor and services would have been required, and there would not have been any sequestration granted by this Court.

The Court: The fact is that all those things were done and the Court so determined in this jurisdiction and that they are entitled to what they got so far. Whether he did what you consider the right thing or not is not for us to discuss at this time. The fact is that he did not do it.

Mr. Rosenblatt: May it please the Court, I think that that is a factor to be considered by the Court.

The Court: I know, but we are not going into the issue as to whether or not he prepared the papers in such a manner as would satisfy the defendant or would not satisfy the defendant. He did what he did and what he thought was the right thing to do.

Mr. Rosenblatt: I take the position, your Honor, that [fol. 514] the question of disclosure to this Court is an element on the question of any allowance for anything.

Mr. Raskin: Could I just make one short statement, that from the order of Mr. Justice McNally——

The Court: We are not interested in that. We are past that now.

Q. Now, when you examined the law and facts in the previous proceedings and you prepared the summons and complaint and then you went forward to publish, you recall that you mailed the summons and complaint?

A. I did.

Q. Where did you mail it?

A. Where did I mail it?

Q. Yes.

A. At the Church Street Post Office.

Q: No; to whom did you mail it?

A. Well, may affidavit——

Q. No, no. You tell us.

A. To the defendant.

Q. That's right; and did you mail it to him in Reno, Nevada?

A. I did. That was the address given by him in the Surrogate's Court where he filed his oath and designation as an executor as the place where he could be reached by mail. That was the address that I used for mailing that paper.

Mr. Raskin: And is that the address mentioned in the order of publication?

The Witness: That's the address.

Mr. Raskin: And you complied with the order?

The Witness: I did.

Q. You know from a perusal of the form in the Surrogate's Court that the statute requires and the form requests [fol. 515] a statement of the residence, don't you, given by each executor?

A. Whether it is residence or address, I don't recall. It may be a statement as to where he could be reached by mail. I do not recall whether it said "residence."

Q. Have you had any experience in the Surrogate's Court?

A. I have had some.

Q. And don't you know that each executor upon qualification is required to file there a statement of his residence?

A. Well, the reason I give you the answer in that form, Mr. Rosenblatt, is because he gave an address the First National Bank Building, and that obviously is not a residence. Therefore, I am not trying to equivocate with you or fence with you; but since he gave an office building which is obviously not a residence as his address, that is why there was a doubt in my mind as to whether he is required to give his residence in the mailing address.

Q. You say that you made a complete and very thorough investigation as to his whereabouts?

A. I did.

Q. Did you make any investigation in Nevada?

A. No, I did not. My investigation was as to whether he could be found in the State of New York to serve process upon him. He could have been in any one of the 47 States and it would not have done me any good.

Q. You did not know whether he could be reached in Nevada or not, did you?

A. The man, as you know——

Q. No, no, just answer yes or no.

A. I could not possibly know.

Q. And when you had these various conferences with the receiver back and forth, and so forth, was there any effort by anyone that was contacted by you or by the [fol. 516] receiver to refrain from giving you and full information as to the assets of the defendant?

Mr. Raskin: I object to that as incompetent, irrelevant and immaterial.

A. I don't understand the question.

Mr. Raskin: This has nothing to do with this phase of the case. There was an order of publication.

The Court: What is the question?

Mr. Rosenblatt: The question was whether everything was openly disclosed to him and the receiver, or whether there were any attempts to conceal assets or anything of the kind.

The Court: By whom?

Mr. Rosenblatt: By anybody.

Mr. Raskin: I withdraw my objection.

A. The only difficulty with that question is that I was never able to question anybody that would have any knowledge about the defendant's assets. True, my inquiry from the bank—and I don't believe there was any attempt to conceal any assets, I don't think there was, but outside of the banks which were disclosed to me by sources other than the defendant, I could not discover any assets, and particularly in my efforts with respect to the Intercontinental Associates there was a refusal to disclose information there, now that I recall it, because in the Intercontinental Associates, which is a company with which obviously the defendant is affiliated, and that is the name that appears in his recently published book, the telephone company had [fol. 517] listed the Intercontinental Associates some place on East End Avenue, in the Borough of Manhattan.

I made a call and I sent an investigator up there in order

to obtain whatever information I could obtain from them.

The investigator was refused access to the place, or the people who had used the name of Intercontinental Associates—I believe the party up there was a party by the name of Chase, or something of that kind—he was refused admittance to the place, and the doorman was instructed not to permit him even to go up there if he ever called again.

I believe somebody from my office made a call to them, and all information was refused, so in that respect I was not given information.

Q. Do you know whether or not the defendant had any interest in Intercontinental Associates?

A. Well, now, I know on the basis of Mr. Harmon's testimony that he did have some interest, and according to what the plaintiff tells me, he did have an interest in it. In fact, according to her, that was his alter ego, that was his corporation.

Q. That's what she told you?

A. That's right.

Q. And Mr. Harmon told you that he had an interest in the net profits of the book, is that right?

A. That's what Mr. Harmon testified to, but the plaintiff tells me differently.

Q. The plaintiff also told you, didn't she, that she was a resident and so was Mr. Vanderbilt a resident of New York in October 1952?

Mr. Raskin: I object to that, your Honor, as incompetent, irrelevant and immaterial.

Mr. Rosenblatt: Let's find out.

A. The plaintiff has told me that she considered the de- [fol. 518] fendant's permanent domicile as New York, and that is why she brought the first action in New York.

Q. And actually that is why you tried for four days the question of the domicile of the parties, is that so?

Mr. Raskin: He did not try it.

A. I think the record speaks for itself in that regard. Whatever happened before this Court is here.

Q. When you came before this Court trying the question

of the bona fides and the validity of the Nevada decree as directed by the Court as one of the elements of the testimony that was taken, did you after reading the Referee's report contend in this court that the parties were domiciled here in October 1952?

A. My answer to that, Mr. Rosenblatt, is this: This Court has never heard the full truth of the defendant's domicile yet, and the only time that the full truth of the domicile will come out will be if the defendant submits himself to the jurisdiction of this Court and testifies and subjects himself to a proper cross-examination.

Q. I am asking you about October 1, 1952, sir.

A. And I still feel there is much to be said about the truth of his domicile.

The Court: Let us get back to the issue here. The issue here is services rendered by this attorney, and let us stick to that.

Mr. Rosenblatt: Now I ask your Honor to note that one of the elements on the question of the value of the services is whether or not this witness regarded himself and his client by the decree of this Court, of Mr. Justice Greenberg, [fol. 519] fixing and adjudging and adjudicating that neither party was domiciled in New York as of October 1, 1952.

The Witness: This action has nothing whatsoever to do with October 1, 1952.

The Court: The fact is that the case was tried before me. The issue was sent to me to try, and I am trying it now. Let us come back to the issue of services, and ask him questions.

Q. I want to know whether after these motions that you talk about before Mr. Justice Benvenga giving you the right to examine the defendant, whether you did ever examine the defendant?

A. I did not, because I had no means——

Mr. Rosenblatt: I move to strike that out, your Honor.

The Court: Strike it out.

The Witness: I think I should be permitted to indicate to the Court——

The Court: This is a question of services. What you did not do does not make any difference here. It is what you did that counts.

Q. You testified as to the determination of Mr. Justice Rabin in answer to your counsel's question. You are familiar with the decision of Mr. Justice Rabin on the granting of alimony and counsel fees, are you not?

A. I am.

Q. Are you familiar with the statement by Mr. Justice Rabin in his opinion as follows:

"On the authority of Harris v. Harris, 279 App. Div. 542, no award of alimony is permissible. In effect, however, the affirmative pleading of the defendant,"——

A. Mr. Rosenblatt, I am fully aware of the whole of the order.

[fol. 520] Q. "——constitutes and attempts——"

A. I know the whole order practically verbatim, Mr. Rosenblatt.

Q. I am going to read this if it takes all day. Your counsel was accorded the privilege of reading a part of this opinion.

Mr. Rosenblatt: Do you remember that, your Honor?

Mr. Raskin: I object to it, if the Court please, on the ground that what counsel is doing now——

Mr. Rosenblatt: He read part of it, and I want to read another part of it.

The Court: You did read part of it.

Mr. Raskin: But he is injecting extraneous matters into this.

The Court: Go ahead.

Q. "In effect, however," Mr. Justice Rabin said, "the affirmative pleading of defendant constitutes an attempt to declare valid a foreign decree of divorce, the validity of which has been held cannot be determined without a trial. Although plaintiff is not squarely within the provisions of Section 1169-A of the Civil Practice Act, she is entitled within the intent of that Section to the means with which to defend herself against the effect of that decree."

Do you recall that?

A. I do.

Q. Now, can you tell us what is Section 1169-A of the Civil Practice Act that plaintiff was not squarely within the provisions of?

Mr. Raskin: I object to that as of no consequence now, unless he questions his knowledge as a lawyer.

[fol. 521] The Court: I will take it only in connection with what research he made as he claims he did in connection with this case.

A. Well, Section 1169 A, I believe, deals with the defense against the effect of a foreign decree of divorce.

Q. Does it have anything to do with counsel fees?

A. I believe it does.

Q. Doesn't Section 1169-A provide for the allowance for counsel fees in a proper case?

A. I said that.

Q. And do you know whether or not the Court in making the decision of Mr. Justice Rabin determined as to both the then value of the services which you had already rendered to the plaintiff——

Mr. Raskin: I object to this, your Honor on the ground the order speaks for itself.

The Court: Objection sustained.

Q. Do you know whether in asking for your counsel fees you asked the Court for a prospective allowance for the defense against the question of the validity of the Nevada decree?

A. Well, all I know is this, Mr. Rosenblatt: That I disagree with Mr. Justice Rabin's opinion of the law; but Mr. Justice Rabin limited the allowance of counsel fee not to the whole case, but only to the narrow issue of defense against the foreign decree, and what is it in assessing that amount, I don't know what went through his mind, but I disagree with the conclusions of law that Mr. Justice Rabin made in his decision and in the order, and I believe that it is erroneous.

Q. When the order of Mr. Justice Rabin was entered the issue by the service of the answer had already been made, [fol. 522] issue had been joined, hadn't it, in this case?

A. Yes, I believe that you served your answer in about July 1st, I believe so, yes.

Q. And tell his Honor——

A. I think you served your answer after I served my motion papers on you.

Q. Whenever the answer was served.

A. It was served subsequently to the time that I served my motion papers.

Q. It was served within the period allowed by Mr. Justice McNally, wasn't it?

A. Oh, yes, yes; you are not in default.

Q. And when did you notice this case for trial after issue was joined?

A. The November Term after the termination of the appeals. I served it in November for the January Term, I believe, sometime in November, rather, November, 1954. The decision of the Appellate Division came down during the month of November, I believe.

Q. Would you tell his Honor why you did not notice the case for trial for the first Term available after the joinder of issue?

A. Because I still had to prepare for trial, and preparation meant examination before trial of the defendant.

Q. But that was never begun, was it?

A. No, because the qualified examination that was allowed to me was tantamount to no examination at all, and I felt that I should not burden myself nor the defendant with services that I felt would be unavailing.

Q. Now, then, on this additional preparation for the trial, was that going over what you had done before you started the suit?

A. Yes, and more.

Q. And did you in preparing for the trial prepare for it with a view to try or with a view toward the determination [fol. 523] of the bona fides of the validity of the Nevada decree?

A. That is one of the elements in my preparation.

Q. And when you came into the court, were you prepared to prove or did you have proof adduced to show that the Nevada decree lacked bona fides?

Mr. Raskin: I don't think that——

A. I had some proof, but I never considered the proof complete, or even complete to me without the testimony of the defendant himself.

Q. In other words, without the appearance of the defendant, you never felt that you had sufficient proof to overthrow the validity of the Nevada decree?

A. That is not what I said.

Q. Well, you say it again.

—. I believe that the proof is sufficient as it is; but I felt that the entire truth will never be known until the defendant is cross-examined in this case.

Q. And when you tried this case for the period of the four days spent in court, and I think on the morning of the 5th day, which I believe was on the 14th, or something like that, tell us what proof or witnesses you were prepared to offer to the Court other than the witnesses that you proffered in connection with the assets of the defendant and the plaintiff herself.

Mr. Raskin: I object to that, your Honor, on the ground that the record speaks for itself.

The Court: The objection is sustained. What he did he did. If you want to ask him what other witnesses he had and how much time did he spend with other witnesses, that's different.

[fol. 524] Mr. Rosenblatt: Thank you very much, your Honor. I accept your Honor's suggestion very gratefully.

Q. Did you see any other proposed witnesses besides the people who testified on the defendant's assets and the plaintiff?

A. Yes—you are talking about the month of December?

Q. I am talking about any time that you prepared for the trial?

A. I think I did speak to another witness who is yet to be called.

Q. Who is yet to be called in this case?

A. Yes, that's right.

Q. I am talking about in connection with the case in so far as it dealt with the bona fides and the validity of the Nevada decree.

A. No, I don't think I saw any other witnesses.

Mr. Rosenblatt: What did you say?

Mr. Raskin: I said to Mr. Winsten to refresh his recollection with respect to some investigation that——

The Court: He is talking about witnesses.

The Witness: Witnesses—you did not hear the question.

Mr. Raskin: Oh, I am sorry.

Q. Now, tell us how many separation cases have you tried?

A. Well, I would say I have tried about a dozen of them although I have been in more than that. They have not all been tried.

Q. I am talking now of the ones that you have tried.

A. Yes, I would say about a dozen, about twelve.

Q. And how long did any one of them take in court days?

A. None of them took more than at the most two days, I would say.

[fol. 525] Q. And what allowance did the Court make——

Mr. Raskin: I object to that on the ground it is not competent or relevant, your Honor. We don't know what the facts were in the other cases.

The Court: Objection sustained. You know, counsel, that what allowances are made in a case upon the parties to pay, the ability to pay, the importance of the case, the position of the parties, and so on.

Mr. Rosenblatt: Well, of course, when I have to try a question of the value of my services I have got a lot more elements in it than just the facts that your Honor brought out.

Q. I would like to know, Mr. Winsten, what is the highest fee that you have ever been paid in handling a separation case?

Mr. Raskin: I object to it on the ground it is not competent here. The standard for compensation is known to this Court and depends among other things upon the wealth of the defendant and——

The Court: Objection sustained.

Q. Will you please tell me what the highest amount of gross income has been yours since you have started to practice in 1931 in any year?

Mr. Raskin: I object to that, your Honor, as incompetent, irrelevant and immaterial, and not within the issues here.

The Court: Objection sustained.

[fol. 526] Q. Will you tell me how much any Court has allowed you in any proceedings where you were paid by the hour, what has been the hourly rate which you have claimed and been allowed by any court?

Mr. Raskin: I object to that on the ground that the question presumes a state of facts that is not before the Court.

The Court: How is that relevant here.

Mr. Rosenblatt: There has been some testimony here about hours and hours of labor.

The Court: Well, I don't know what the facts were in those other cases where he was paid maybe $5 or $500 an hour. Suppose he tells us that he was paid $500 an hour in one case and $10 an hour in another case.

Mr. Rosenblatt: Then the answer would be that he was paid $500 an hour for the greatest allowance made to him by a Court?

The Court: How would that help me? I am only concerned with the amount of work that he put into this case. It would depend on the type of a lawyer he is. You would have to go into the type of cases that he has handled and his type of clients, and all of those things. Outside of that I won't take any other testimony.

Q. You stated to the Court the estimate of your fees outside of the work that you did in connection with the appeals to be a total of $25,000, is that correct?

A. That's correct.

Q. Now, break it down and tell us on what that is based?

A. It is based upon the fact that——

Q. By the way, does that include or exclude the $2,500 which was already allowed by the Court?

[fol. 527] A. That includes the net amount remaining after my disbursements of the $2,500, and I should have indicated that of the $25,000 I feel that $24,000 should be paid to me giving credit for approximately $1,000 net remaining to me of the $2,500, which I have already received.

Q. Tell me the standards upon which you base that request for $24,000?

A. The standards that I base it on is this: That since March or April 1954, both Mr. Raskin and I have devoted a substantial part of our time, of our working time, in dealing with one or another phase of this case, and that based upon the amount of time and effort expended in this matter I feel that that is reasonable compensation for myself, and taking into consideration the fact that I will have to pay Mr. Raskin for the time that he spent, and in addition to that I expect that there will be besides the fact that we are at the closing stages of this trial, that there will be additional work to be done after today.

Q. Would you tell the Court how much of a period on an annual basis you would estimate that you have spent in order to achieve the amount of $24,000?

A. I don't understand your question.

Q. Well, would it be a month, two months, three months, four months, seven months, nine months—whatever the amount is?

A. I would say that each of us has put in the equivalent of about half of the time between March and today in this case, I would say the equivalent of about four to five months, somewhere around there.

Q. For each of you?

A. That's right.

Q. A total therefore of approximately eight months?

A. That's right.

[fol. 528] Mr. Rosenblatt: Now I ask your Honor to permit me to inquire as to what the gross income of the witness has been.

The Court: I will allow it now. Go ahead.

Q. Will you give me, please, a statement of your gross income for the past five years?

Mr. Raskin: I object to that on the ground——

Mr. Rosenblatt: Only from the practice of law, it has nothing to do with anything outside.

Mr. Raskin: I object on the ground it is not within the issues here.

The Court: Objection overruled, but five years is too many years, too remote. Give it to us for the last two years.

The Witness: I would say my gross income from the practice of law in the past two years was twelve to fifteen thousand dollars.

Q. A year?

A. Yes.

Q. Would that be true for three years ago, the same?

A. I don't recall.

Mr. Raskin: I object.

A: (Continuing) At certain periods it might have been more, at other periods it might have been less. I might indicate this: That my income varies from year to year, taking into consideration the fact that during the period of the War I had been entirely withdrawn from practice.

[fol. 529] Q. I didn't ask you about that, the Judge wouldn't let me ask you five years before. I was withdrawn myself from practice for five years during the war. I mean, we don't go into those things.

Mr. Rosenblatt: I think that's all.

The Court: All right, step down.

Jack Oppenheim, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

(The witness states he resides at No. 98-50—63rd Drive, Forest Hills, Queens, New York City, and has an office at No. 12 East 41st Street, Manhattan, New York City.)

Direct examination.

By Mr. Winsten:

Q. What is your business, Mr. Oppenheim?

A. I am a real estate broker and appraiser.

Q. Your qualifications are set forth in this paper that I now hand you?

A. Yes, this is a partial statement of my qualifications.

The Court: Is there any question of this man's qualifications?

Mr. Rosenblatt: None from his statement. I don't know what he is here for.

The Court: When were you licensed?

The Witness: I have been a real estate broker for over 20 years.

The Court: You maintain your own office?

The Witness: Yes, sir.

The Court: Your own staff?

[fol. 530] The Witness: Well, I work individually; I am a real estate expert for the City of New York in certiorari proceedings. In my statement of qualifications I listed among others the William Waldorf Astor Trust.

Mr. Rosenblatt: I will concede his qualification as a real estate expert.

Q. Mr. Oppenheim, are you familiar with the reasonable rental values of apartments in the east side of Manhattan?

A. I am.

Q. Now, what would be the reasonable rental cost or rental value of a five or six-room apartment on the east side of Manhattan in the Midtown between 60th and 86th Streets, taking into consideration an apartment in a house of a fairly good standard?

Mr. Rosenblatt: I object, your Honor, upon the ground that this is irrelevant, incompetent, immaterial, it has nothing whatsoever to do with this case. This man by reason of being an expert cannot testify any better than I who occupy one of those apartments. There is no showing here as to a requirement that the person lives within the area on the East Side from 61st Street to 86th Street. There are other very desirable portions of New York, believe me.

The Court: I will take it all subject to connection.

Q. Are you familiar with rental values?

A. Yes.

The Court: If his testimony does not apply in this case, it is worthless; but I will take it. They are merely offering [fol. 531] him as their witness to establish what sum she is

entitled to for the rental of an apartment in the location that he is testifying to. Go ahead.

The Witness: Rentals in new buildings, built since 1947, buildings that are free of rent control, in that area, and other similar areas, such as the lower part of Fifth Avenue, which would be comparable, or further east in the 50's in the areas from 2nd Avenue east over to the River, would run from $800 to $1,100 per room on an annual basis.

Q. Will you give it to us on a monthly basis, it is easier for us to comprehend.

A. Well, say a six-room apartment would rent in a building of the type that we are discussing about from five to six thousand dollars annually, which would be from four to five—a little over four hundred to five hundred dollars a month.

Now, there are, of course, many more controlled buildings. In those buildings the rents run lower because of the controls.

The Court: What is it? We all know it is lower in controlled buildings. How much is it?

The Witness: I cannot say what the rental—I can say what the rental value is if they become available. They vary, depending upon the time at which the rents were frozen.

The Court: What about the controlled apartments?

The Witness: In controlled apartments I would say that per room for comparable apartments to the uncontrolled, [fol. 532] as against 900, 1000, $1,100 a room, they would probably run 600, 700, $750 a room per annum.

Q. The controlled apartment would run about two-thirds or 66 2/3 per cent of the uncontrolled?

The Court: How much is that a month, Mr. Expert?

The Witness: On a monthly basis I would estimate that a fair average for comparable apartments would run $300 to $325 a month.

Q. And that is unfurnished, is that correct?

A. That is unfurnished.

Q. From your knowledge and experience can you tell the Court anything about the availability of controlled as distinguished from uncontrolled apartments in that area?

A. Well, controlled apartments are virtually unobtain-

able. Only uncontrolled apartments are ordinarily available.

The Court: What about above 86th Street, from 86th Street to 92nd Street, what about that area on the East Side, beginning from Fifth Avenue?

The Witness: On Fifth Avenue I would say up as far as 96th Street the same rates would prevail.

On Madison Avenue I would say possibly to 91st or 92nd Street. Beyond that it tapers off.

On Park Avenue it would depend on the building. In my opinion, as you get above 88th or 89th Street it becomes somewhat less desirable, but I don't know that you can get it any cheaper.

[fol. 533] The Court: You mean that the same prices prevail up there, is that right?

The Witness: Yes. As I say, above 90th Street it begins to taper off.

The Court: I am asking you about 88th Street and up to about 90th Street or 91st Street, in a comparable type of building that you are describing below 86th Street?

The Witness: The same rates would prevail up to about 90th Street, and I would say 10 per cent less north of that up to 96th Street.

The Court: Anything else?

Mr. Winsten: That is all.

The Court: You may cross-examine.

Cross-examination.

By Mr. Rosenblatt:

Q. What about an apartment in the same area in not a new building, uncontrolled, what should a four-room apartment bring?

A. If the apartment became uncontrolled because of alterations, which is about the only way it would become uncontrolled in an old building, the rates might be substantially higher, as is the case at the northwest corner of 86th Street and Park Avenue, where I was an expert for the owner, where they remodeled apartments, and they got $1,100 or $1,200 a room.

Q. How much is that a year on a four-room apartment?

The Court: $4,800.

Next question.

Q. Do you know of any areas in New York where people reside, in the opinion of real estate experts like yourself, [fol. 534] which are just as desirable to live in as it is between 60th or something and Park Avenue and 86th Street on the East Side?

A. Well, I mentioned two areas, Fifth Avenue from about 11th Street down to Washington Square, but there, strangely enough, the rents run a little higher.

Q. And is there any other area as desirable, in your opinion?

A. Yes; over in the so-called Sutton Place district.

Q. And they run higher too, don't they?

A. Well, I would say that they run about the same, in some instances a little higher.

Q. Now, is there any other place that you think a person could probably reside in the City of New York and enjoy a residence equal in value to any of those which you have described in these three areas?

A. Well, the qualification of equal in value, Mr. Rosenblatt, depends——

The Court: You mean in comfort, or value of the property?

Mr. Rosenblatt: Value of the property. Comfort you could achieve anywhere, I hope, your Honor.

The Witness: I didn't know what you meant. That is why I wanted to clarify it.

East End Avenue might be considered by some comfortable.

Q. What do you consider, you are the expert.

A. I do not consider it as good, although I have appraised properties on East End Avenue, No. 55 East End Avenue, and I think our rent ran $800 a room. I appraised 200 East End Avenue and I think our rent there was about $750 a room.

Q. And how do you feel about any other sections of [fol. 535] New York City, Central Park South, for example? Do you think that that is less desirable area to live in than

Park Avenue on the East Side, from 60th Street to 86th Street?

A. I think that most experts would consider it a little less desirable, although I personally might be just as satisfied to live there.

Q. And you are testifying now as an expert, are you?

A. That is right.

Q. You say that you would consider it as desirable although other experts might not?

A. I say for my own personal properties I would consider it as desirable. I might consider some of the buildings on Central Park South as superior—not many—than in the district we considered before.

Q. Now, let us go over to Central Park West. What is the matter with Central Park West?

A. I would say that Central Park West, even the better buildings today are losing their desirability to the so-called de luxe type of tenants.

Q. Tell us about the rent over there for a four-room apartment in a building uncontrolled on Central Park West.

A. I don't think there are any uncontrolled buildings on Central Park West. I don't think there have been any built since 1947.

Q. You don't know of any?

A. I cannot think of any offhand.

Q. Are you familiar with all the properties up on Central Park West?

A. Pretty generally, yes.

Q. And you don't know of one that has been decontrolled?

A. If it has been decontrolled for some special reason, I may not know of it, but I cannot recollect any.

The Court: But there has been no new building built where the rent control does not apply, on Central Park West?

The Witness: No, your Honor.

[fol. 536] Q. How about remodeled buildings over there?

A. There may be some, but as a general rule——

Q. No, no; I am talking not about a general rule. Do you know if any have been, or would you say none have been?

A. I don't know of any that have been completely remodeled. There may have been apartments within certain buildings that have been remodeled, but I would have no way of knowing it.

Q. Now tell us about Riverside Drive.

A. It would not be comparable.

Q. In other words, when I lived at 108th Street and Riverside Drive, it would not be comparable to where I live now on the East Side, is that your testimony, sir?

A. I lived on 108th Street and Riverside Drive, and I did not consider it comparable with the area that we were discussing.

Q. You don't consider it comparable. What is this area that makes it so wonderful?

A. The desire of people to live in the area and their willingness to pay rent for that privilege.

Q. You don't contend that that area is any more desirable from a comfort standpoint, do you?

A. Are you talking about the apartments themselves?

Q. I am talking about the apartments themselves, the facilities and the utilities provided for those apartments.

A. Except for the fact that as a general rule the service rendered in the East Side apartments is superior. I would say that physically the apartments could be just as good, and could even be better in some instances on the West Side. There is no rule about that. They could be just as good, and I am sure some are.

Q. You don't think the Bronx even deserves any mention, do you?

A. I did not think this is any part of this problem. I certainly would consider——

[fol. 537] Q. Are you a real estate expert for the Bronx too?

A. I have testified in the Bronx, but I do not specialize in the Bronx.

Q. You would not consider that the Bronx was as good a place to live in as between 60th and something street on the East Side and 86th Street, would you?

A. I don't know what your standard would be as to what is good for people. I cannot determine what is good

for a person. Some people might be better off if they lived out in the suburbs. That is not my province, to decide that.

Q. How about the comfort in the apartments and the service rendered?

A. Physically it depends upon the construction. It could be just as good as Forest Hills, where I now live, as it is in the area we are discussing. I am content to live in Forest Hills. That meets my requirements. If I felt that my situation required that I live in the area which we have discussed and I had to pay the fair rental value, I would have to pay the prices that I have testified to.

Q. And would you say that a decontrolled apartment of five rooms, carrying a rental of $400 a month was right or wrong in your opinion as a real estate expert, assuming the building were located on 61st Street and Park Avenue?

A. You said a five-room apartment?

Q. That is right.

A. For $4,800?

Q. That is right, 61st Street and Park Avenue.

A. I have to do a little mathematics.

Q. You do it; just take your time, and tell me.

A. Now, would you please repeat the question, Mr. Stenographer?

The Stenographer: "Q. And would you say that a de- [fol. 538] controlled apartment of five rooms, carrying a rental of $400 a month was right or wrong in your opinion as a real estate expert, assuming the building were located on 61st Street and Park Avenue?"

The Witness: I think that is in the proper range.

Q. Would you say that $350 a month is a proper amount?

A. I think that would be very cheap.

Q. And if they were produced in this court tenants who pay $350 a month for a five-room apartment located on 61st Street and Park Avenue, you would say they were getting it very cheap, an uncontrolled apartment, a decontrolled apartment, is that your testimony?

A. I would say that, but I don't know of any decontrolled apartment at 61st Street and Park Avenue, because they were all built prior to 1947.

The Court: What you mean is——

Mr. Rosenblatt: There are decontrolled apartments.

The Court: What you mean is, cut-up apartments?

Mr. Rosenblatt: Yes, sure.

The Witness: I would like to know the location of the apartment.

Q. I just gave it to you, 61st Street and Park Avenue.

A. I mean in the building itself. It might be a rear, dark apartment. They did that at 72nd Street and Park Avenue, on the southeast corner, and they have some apartments so badly cut up that in my efforts later to try to sell the building every prospective buyer turned down the purchase [fol. 539] even though the price seemed low, because some of the apartments were so badly cut up that it would have cost a fortune to change it over again.

Q. So I take it that the rental depends upon what kind of an apartment you get in any area?

A. Of course. I was giving average rents.

Q. And a front apartment or a rear apartment may carry different rentals even though their layout may be the same, will they not?

A. They certainly will if the owner has any experience in managing a building.

(Whereupon a recess was taken until 2:10 P.M.)

AFTERNOON SESSION

2:10 o'clock P.M.

PATRICIA W. VANDERBILT resumed the stand and testified further as follows:

Direct examination.

By Mr. Winsten:

Q. Mrs. Vanderbilt, during the period between 1948 and 1952, September, 1952, when you resided with the defendant, what expenditures were made in connection with the maintenance and schooling of your daughter, Nanette?

Mr. Rosenblatt: May it please the Court, may the record show that I have a general objection and exception to [fol. 540] this entire line of testimony, on the grounds previously stated, which in the case of the previous witness your Honor has overruled.

The Court: Is it in connection with any particular testimony?

Mr. Rosenblatt: This is a general objection, your Honor.

The Court: For the support and maintenance?

Mr. Rosenblatt: I was coming to that next, your Honor.

The Court: You may have an exception.

Mr. Rosenblatt: Now on the specific question I object to that on the ground that whatever has applied to this child of the plaintiff has nothing to do with the case.

Mr. Winsten: I do not contend, if your Honor please, that this defendant is required to support this child. This is offered in connection with showing the mode of living of the parties during the time that they were married and this is one of the items of expenditure of the parties, and that is all.

The Court: If you say you don't contend that he has to support and maintain the child, then what difference does it make?

Mr. Winsten: It shows the scale of expenditures that the defendant was making.

The Court: Let that come at the end if it is necessary.

Mr. Winsten: I withdraw the question.

Q. During the period between 1948 and September of 1952 what expenditures were made by the defendant with respect to rents and places of residence that you and the [fol. 541] defendant resided in during that period?

A. Well, we spent $800 a month on two different leases. One ran twelve—fifteen months, and then the other was the disputed one which comes later on, and then there was one——

Mr. Rosenblatt: May it please the Court, I see that the witness is reading from papers. I have no objection if the witness requires——

The Witness: I am not reading, Mr. Rosenblatt.

Mr. Rosenblatt: I saw the evidence with my own eyes.

The Witness: I am not reading, Mr. Rosenblatt.

Mr. Rosenblatt: I ask that these papers be removed.

The Court: Just turn the sheet over if you can testify without it. If you cannot, just look at them and then if you want to testify, you may.

The Witness: They are only notes.

Q. Will you tell us about the rent?

A. There were two $800 a month houses, and then there was one at $600.

Q. Where were they?

A. They were both in all three were in California.

Q. What kind of a neighborhood were they in?

A. Two in Beverly Hills and one in Belle Air.

Q. What sort of residences were they, Mrs. Vanderbilt?

A. Well, I guess they are about the best they are in the the world, as far as I know.

Q. Will you describe them, please?

A. Well, they——

[fol. 542] The Court: Will it be conceded that the neighborhood—do you want her to describe the neighborhood of Belle Air and Beverly Hills?

Mr. Rosenblatt: No, your Honor.

The Court: In other words, it is conceded for the record that the neighborhood where these homes were located——

Mr. Rosenblatt: Were excellent neighborhoods.

The Court: Were excellent neighborhoods.

Q. You stayed in other places in California, did you not, with the defendant?

A. Well, I stayed at the Beverly Hills Hotel.

Q. And how much rent did you pay there?

A. Well, that runs more than the houses. I made the comparison at the time. The houses ran about $800 and the hotel would run around $1,200 a month.

Q. Now, did you stay at any hotel in Chicago for any period of time?

A. Yes, the Ambassador East Hotel.

Q. For how long a period, how long were your stays there?

A. Well, all told, I think about two or three months on a weekly or monthly basis, and that averaged, I think, about $1,200, $1,300 a month.

Q. Did you occupy a room or a suite at the Ambassador East Hotel?

A. A suite.

Q. How many rooms did it contain?

A. It had two bedrooms, a living-room, kitchen, and two baths.

Q. Mrs. Vanderbilt, was there a time when you and the defendant were in New York, when you were searching for an apartment or residence in New York?

A. Yes.

[fol. 543] Q. Tell the Court when that was and what happened at that time?

A. Well, it was either in 1950 or 1951, and we looked at furnished and unfurnished apartments. We looked at most of them together, and that was in the area between Park and Fifth and 60th and 85th or 90th, around in there.

Q. Was anything said between you and the defendant with respect to the type of area of the neighborhood that the defendant wanted to live in?

A. Yes, he picked the area himself.

Q. Tell us what he said please.

A. Well, this is with the real estate agent, and I remember hearing him—the three of us talking about that area, and he said that that is definitely the area in which he wished to live, that's where his family lived and his friends.

Q. Now, in connection with your maintenance of your household in California, can you tell us what expenditures were made during the period from 1948 to 1952 with respect to servants?

A. Well, a cook ran me $200 up a month, and a maid ran me about $175 a month, and extra help on an hourly basis, two, three days a week, would run me also about $175 a month.

Q. Was there ever a nurse employed, besides the help which you indicated?

A. Yes, that's the nurse that we had in New York and

also in Europe, and she averaged between about $40 and $45 a week.

Mr. Rosenblatt: May I move to strike out any testimony in reference to the nurse unless it was for her personally?

The Court: What about that, counsellor?

Mr. Winsten: For the same reason, your Honor.

[fol. 544] The Court: To show that he had other funds that he was spending?

Mr. Winsten: That's right.

The Court: For that purpose alone I will take it.

A. (Continuing) She ran $40, $45 a week, and she traveled first class with us.

Q. Did she accompany you on both trips to Europe in 1949 and 1951?

A. Yes.

Q. And did she occupy first class quarters?

A. Yes.

Q. On the steamer?

A. Yes.

Q. And she was being paid a salary at the same time, is that correct?

A. That is correct.

Q. And when you traveled through Europe what quarters did she occupy on the Continent?

A. The very same first class in all the same hotels with us.

Q. Now, what expenditures were made between 1948 and 1952 with respect to food for your household?

A. Well, food for the household used to run me about $800 a month for the grocer and the butcher.

Q. What other expenditures were made for food?

A. Well, there were other food bills for guests.

The Court: In addition to the $800, guest's food?

The Witness: Yes, sir.

Q. How many people were normally living in your home?

A. Four or five. The servants ate the same food that we ate. If we had steak, they had steak.

Q. Now, what expenditures were made for liquor [fol. 545] during that period?

A. Well, I would say on an average of $250 a month in the house.

The Court: For what?

The Witness: For general use, please in and out of the house, and parties, and what have you.

Q. And were there any additional expenditures made for general supplies, uniforms, and so forth?

A. That's right. Uniforms and other household supplies, I would say that averaged me around $100 a month.

Q. And what expenditures were made for cleaning and laundry during that period?

A. Well, the cleaning bill ran me around $30 a month for the clothes cleaning, and then laundry run me about $50 a month.

Q. Now, with respect to gas, electric and telephone and water, what can you tell us about those expenditures?

A. Well, gas ran me about $15 a month. I think that included heating the house, and the electricity about $25 a month, and the water was billed three times, I mean every three months, about $8 a month, and then there is drinking water, which is separate, and that is about $3 a month.

Q. Now, during that period——

A. Did you ask me about the telephone?

Q. Are you through?

A. No, the telephone.

Q. Yes.

A. That ran me at a minimum $100 a month and well over $200 a month when Neil was in the house.

Q. Does that include telegrams, telegram service too?

A. I think so.

Q. Now tell us about expenditures that were made dur- [fol. 546] ing 1948 to September, 1952, with respect to your clothing.

A. Well, I have broken it down here and I don't know how to do it except——

The Court: Just look at it and say—do you have to look at it?

A. (Continuing) I spent—do you want this by the year?

Q. I want it on an annual basis if you can give it.

A. On an annual basis I believe about $18,000, $19,000.

Q. How is that broken down?

A. Well, I have gloves $1,000, and bags at a thousand, shoes $1,500, hats $750, coats, $2,000.

Q. About how many coats would you have a year?

A. Oh, I had several over all the year, spring and summer and winter and fall. I have it broken down more if you would like that.

Q. How much was your average expenditure per coat?

A. It would be at least $200.

Q. Now, what else, please?

A. I had evening gowns, that is, short and long ones, $3,000.

Q. About how many gowns would that represent a year, Mrs. Vanderbilt?

A. Evening gowns, I would say, formals, I would have about five a year, and the shorter type formal, about five also a year.

Q. And about how much would those gowns cost, Mrs. Vanderbilt?

The Court: She said $3,000.

Q. Now, continue, please, with your clothing expenditures.

A. Then wool suits and dresses, this is fall and winter clothes, $2,000; and spring and summer wear, $2,500.

Q. And what would they include, about how [fol. 547] many different outfits or costumes would that buy?

A. Well, that is suits and better dresses for the spring and summer and sort of evening linens a sort of, no silks.

Q. And what else?

A. That's $2,500. Now, for summer wear, for cool wear and resort wear in Europe or Florida, wherever we were, that ran about $1,000 a year; and in lingerie about $1,500 a year.

Q. Now, were any furs purchased during that periods?

A. Yes. I have a full length breath of spring mink coat.

Q. How much did that cost?

A. $6,000.

Q. Now, have you given us all that you have to say about clothing?

A. Well, there are incidentals that I have not included.

The Court: Do you buy a mink coat every year?

The Witness: No, sir.

Q. That was not an annual expenditure, was it, Mrs. Vanderbilt?

A. No, no.

The Court: I thought you had it broken down by years.

Mr. Winsten: No, your Honor. This is specific, this one purchase.

Q. When was that bought?

A. That was in January, 1951.

Q. Is that the coat that you sold after applying to Department of Public Welfare?

A. That's right.

Q. Now, with respect to entertainment during 1948 to 1952, what expenditures were made in that regard on an annual basis?

[fol. 548] A. Well, here I have for theatre tickets, ballets, ice shows, and other types of shows, horse shows, and so forth, most of the time we took two other people, and four, and sometimes six, and I have that $1,000 a year.

Q. Were there any other forms of entertainment other than shows that you have indicated?

A. Well, a lot of night club expense, about $100 a week as a minimum.

The Court: $5,000 a year for night clubs?

The Witness: Yes, sir.

Q. Did you go alone with the defendant or were you accompanied by other people?

A. Well, we went alone and then we would take other couples, or six or eight or ten people sometimes, and then people would come to the table, and a lot of liquor.

Q. Were there any expenditures made during the period of 1948 to September, 1952, with respect to——

The Court: Is that $5,000 all together, or $5,000 a year?

The Witness: $5,000 a year, sir.

Q. With respect to gifts made by you and by the defendant during that period?

A. Yes, we gave a large amount of gifts to what Neil called a sort of public relations people, newspaper people, and sort of politicians, and that ran about $2,000 a year, and that would include cases of scotch which would run

around $90 a case, and white wines, about $40, $50 a case, huge plants and flowers which ran $30, $40 apiece,—about $2,000 a year all told on that.

Q. What about the gifts that the defendant made to you and to your daughter, Nanette, can you give us any infor- [fol. 549] mation on expenditures made in that regard?

A. Well, I can only make an estimate of incidental things other than my—this is exclusive of what jewelry he gave me—I would say for Nanette and me about $2,000.

Q. Now, were there any other items of expenditure that were made by the defendant during that period?

A. What do you mean?

Q. Well, were there any expenditures made for personal attorneys or counsel during that period?

A. Why, yes. He had a counsel at all times on retainer, at least $100 or $200 a month for all of the four years, and that is only the minimum, because he had other things, what he called supplementary proceedings, and other expenses in addition.

Q. Now, what expenditures were made during that four-year period with respect to medical and dental treatment of yourself and your daughter?

A. Well, may I take that by the year, because——

Q. Did they vary from year to year?

A. That's right.

Q. Tell us as best you can what expenditures were made during that period.

A. In 1952, approximately $4,000 on me alone, and $800 on Nanette. I don't know about Neil.

In 1951 on me alone there was at least $1,000.

In 1950 I only had—I was under a sort of general care in California, and that ran maybe $250 or $300, with all the shots and vitamins and all that sort of thing, and a blood test that I had.

Q. What expenditures were made in 1952?

A. Well, in 1952—on the medical?

Q. Yes.

A. Well, I have a very long list here, which I recall——

Q. What was the total amount, you said?

A. $4,000.

Q. Why was it that high in 1952?

[fol. 550] A. Well, I had several doctors and many, many tests. I had Dr. Colliani for a complete blood analysis and general care; and I had another doctor for X-rays, and analyses, that is a complete spinal X-ray, and then they sent me to see Dr. Rupert Raney, who is a neuro-surgeon, who examined me and sent me to see Dr. McMasters for physiotherapy in order to avoid an operation on my back. Then I was with Dr. McMasters from April or May for the remainder of the year for three or four times a week in his office most of the time, and then he put me in a hospital in September for a week, and there were a lot of tests there, head tests for the headaches, and the concussion things which were still going on very strongly. Then he set up a hospital traction bed in the house somewhere in there which I had to sleep in, and that alone ran over $1,076; and then a cervical brace for my spine, $108.70; and another head holder to hang myself from the ceiling in the house, about $20, $30 on that; and then in the month of November in St. John's Hospital.

Q. Mrs. Vanderbilt——

Mr. Rosenblatt: May we have the hospital location? She said St. John's Hospital.

Q. Where is St. John's Hospital?

A. Santa Monica, California.

Q. Mrs. Vanderbilt, after September, 1952 have you been receiving any medical treatment between that period and the present date?

A. Well, yes.

Q. Tell us, tell the Court in a general way, without being too detailed, what kind of treatment you have had and how frequently that treatment was.

A. Well, in 19—let's see—what is this, 1955? In 1953 I had almost all the year with Dr. Patterson here in New York City.

[fol. 551] Q. How frequently did you see him?

A. Well, I had physiotherapy twice a week at his office for many months, and then at the same time he had me with Dr. Murphy who was giving me two shots a week for my health.

Q. Besides those two physicians in 1953 did you have any other treatment or hospitalization?

A. Yes. I was for six weeks in Doctors Hospital here in traction, and getting physiotherapy, and then there were X-rays of all kinds.

Q. Were you also in Bellevue Hospital?

A. Well, I was taken there. I fainted and the police took me there.

Q. How long were you in Bellevue?

A. The doctor just looked me over and then advised that I better see Dr. Patterson and Dr. Murphy.

Q. Now, you continued with those two physicians during the period of 1953. How about 1954?

A. Well, 1954 pretty much the same thing except that I had to stop going to Dr. Murphy and Dr. Patterson because I did not have the carfare to get there.

Q. When did you stop going to those two physicians?

A. I cannot remember, sometime in the summer.

Q. Did you pay Dr. Murphy and Dr. Patterson during 1953 and 1954?

A. No.

Q. They sent you a bill for their services?

A. Well, I have not got the complete bills, no.

Q. Now, have either of those two physicians indicated that you may need major surgery or major medical treatment?

A. Well, they all believe, going back to Dr. Rupert Raney—he is one of the top neuro-surgeons in the country—that this thing in the neck, that there is an operation indicated. However, they must do everything to avoid it. They have all said that—Rupert Raney, McMasters and Dr. Patterson here.

[fol. 552] Q. Have you received any medical treatment recently since you ceased going to Dr. Murphy and Dr. Patterson?

A. Yes, I have from a general practitioner who is only a block away so that I can walk to his office and he gives me shots and medication.

Q. Did anything occur recently as a result of which you went to this general practitioner?

A. Yes. All along I get very severe shakes and fainting

spells, and when I had another one the hotel called him in and I have been going to him ever since. That's from the malnutrition and general rundown condition.

Q. What is the name of that doctor?

A. That's Dr. Kretsberg.

Q. And where is he located?

A. At 38th and Park Avenue.

Q. He is a doctor that was called by the hotel in which you are now living?

A. Yes.

Q. The testimony you gave with respect to expenditures, did they include expenditures that you made in connection with beauticians and cosmetics and so on?

A. No, I have that separately here.

Q. Can you give us an idea of what the annual expenditures on that were during that period from 1948 to 1952?

A. Yes, about $20 a week for the beauty shop and about $40 a month for toiletries and creams and all that sort of thing. I have about $1,480 on a yearly basis.

Q. Now Mrs. Vanderbilt, during that period did you make any extensive trips with the defendant either to Europe or over the continental United States?

A. Yes, we made two trips to Europe, one in 1949 and another one in 1951, of about four months duration each time.

Q. And who went along on these trips?

A. Mr. Vanderbilt, Nanette, the nurse and myself.

[fol. 553] Q. And what vessel did you use on your first trip?

A. The first one we took the Holland-America Line.

Q. What sort of accommodations did you have?

A. We had two or three cabins.

Mr. Rosenblatt: May it please the Court, she previously testified that they went first class both times.

The Witness: This is first class.

Q. You occupied more than one room, Mrs. Vanderbilt?

A. That's right.

Q. How many rooms did you and the defendant occupy?

A. Well, we had one or two—I can't recall what we had going and what we had coming back because they were different.

Q. Did Nanette and the nurse occupy a separate room?

A. No, they were usually together, but there was one time when the nurse was in a separate room.

Q. Now in 1951 you went across on the America?

A. That's right.

Q. And you returned on the same vessel, is that correct?

A. Yes.

Q. What sort of accommodations did you have there?

A. Well, Neil and I had a suite, and Nanette and the nurse had a cabin together.

Q. How many rooms was this suite?

A. It has a bathroom and a bedroom and—two bathrooms, a bath mat, they call it, a living room and a bedroom.

Q. Do you know how much was paid for that suite on the America?

A. Yes, I do, and I have confirmed it with Thomas Cook's. $4,700 for the round trip fare for four people.

Q. Now, how much would you say was expended by the [fol. 554] defendant for incidentals, tips and other things on the round trip voyage in 1951?

A. Well, for the overall boat round trip I have a figure of $6,000. Now that included the fare, parties aboard, betting on games that they play aboard, tips to steward and waiters and bartenders and deck stewards and all kinds of different people.

Q. On each occasion you were in Europe for about four months, is that correct?

A. Yes.

Q. What sort of hotels and places did you stay at while touring Europe?

A. Well, we stayed first class everywhere.

Q. Did you occupy a room or a suite and in what kind of a hotel?

A. Well, they are all first-class deluxe hotels according to the mission guide line which is what we carried along with us.

Q. Have you any idea what he expended per day for the four of you in hotel accommodations?

A. Yes, sir; at a bare minimum he spent $40 a day for the four of us.

Q. And do you have any idea, during each of those trips, what was expended for food and entertainment for the four of you per day?

A. Yes, sir; that's about $20 apiece, and that is a bare minimum, that's about $80 a day.

Q. Did you travel through Europe with a car?

A. Yes.

Q. Did the defendant bring the car from the United States?

A. Yes.

Q. What would you estimate the cost of transporting that car from the United States and the use of that car while touring Europe for four months?

A. Well, I think to ship it runs around $500. I don't know how to estimate the cost of gas and oil and repairs over there except that we used it daily and we would drive eight and ten hours a day, I guess it would be a great deal. I don't know how to estimate that.

[fol. 555] Q. Now Mrs. Vanderbilt, while living in the United States, was there a family car?

A. Yes.

Q. What kind of a car was it?

A. It was a Cadillac.

Q. When was it purchased?

A. I got it about late 1949 or early 1950. I had one before.

Q. About how much was paid for it?

A. $5,000.

Q. And what do you estimate was the expenditure made for upkeep and maintenance of that car per year?

A. $2,000 per year.

Q. Now, during the period from 1948 to 1952, September of 1952, did the defendant purchase any jewelry for you?

The Court: She said $2,000 a year.

The Witness: No, sir. That's exclusive—that's for gifts. The jewelry overall including my wedding ring, engagement ring, it cost $10,000, that's for real jewelry.

Q. That is not per year, is it, that's during the entire period?

A. That's during the period.

Q. Now, in addition to precious jewelry, were they any expenditures made for so called costume jewelry?

A. Yes, there is a lot of that. A lot Neil gave me, and I find it difficult to estimate it, so that I can say I put it at at least $300 a year on it myself, and he gave me a lot of other things.

Q. Now, Mrs. Vanderbilt, other than the two European trips, can you tell us something about other trips that you made with the defendant or that you made alone during that four year period?

A. Yes. Together in California we made at least two trips to San Francisco from Beverly Hills, and stayed there about a week each time at that hotel across from the Mark Hopkins one time, and then in the Mark Hopkins another time.

[fol. 556] Then we made a stay at Carmel, which is the place by the sea that I was trying to remember the other day, for about a week or ten days there; and at least once he went to Palm Springs with us, where we would take a cottage, and I think we stayed ten days the time he went, and then Nanette and I on two other occasions we went to Palm Springs.

Q. Did you make any flights between California and New York during that period?

A. Yes, I made at least two round trips in 1950 on TWA. That's about $500 for me. Then in 1951 I made another one early in the year, and 1949 I made a train trip to California.

Q. Did you make any trips to Florida with the defendant?

A. Yes, that was the winter of 1948-49, and we were down there part of December and I think all of January.

Q. Now, where did you stay when you were down there?

A. We stayed part of the time in a cabin at Fort Lauderdale and then we moved for part of the time down closer to Miami Beach, and I cannot tell you the name of that place.

Q. Now, Mrs. Vanderbilt, can you tell the Court where your clothing was purchased and the names of some of the places where your clothing was purchased during this period?

A. Yes, sir. In New York, I shopped at Bergdoff Goodman's, Bonwit Teller, Sak's Fifth Avenue, and then that other woman's—she is a woman designer—Hattie Carnegie, and a lot of specialty shops on Madison Avenue—I cannot

remember all of the places; shoe shops, I. Millers, and places like that.

Then in Chicago I did a lot of shopping there at the Stanley Karsek, who is an exclusive women's designer there, and at Carson, Pirie and Scott, and then at that other department store——

[fol. 557] Q. Marshall Field?

A. Marshall Field, and also at little specialty shops up and down Michigan Boulevard.

Q. Now, how about Paris and London?

A. Well, in London we got some things at Norman Hartwell, who is the dresser to the Queen.

Q. How many things did Mr. Vanderbilt get you there?

A. I don't remember. He shopped there both trips and got me things both times.

Q. Did he do the shopping himself on these particular occasions?

A. Yes. I as with him the first time. I was not with him the second time.

Q. What did he get you there, just the kind of things that he got you there?

A. Well, there was one beautiful opera gown. I remember that he said it ran to $1,000 or $1,200. Then there was a black wool and satin outfit, which I remember was named Geminii, and that had a hat that went with it, and that was about $600.

Then he got an awful lot more in 1951, and I kept some of them and some of them I sent back.

Q. What were the places you shopped at or you made purchases of clothing at in Paris?

A. Jean Dessay and Christian Dior and Jacques Fath. I actually got things there, and I went, of course, to all the shows, but I did not buy from all of them.

Q. Now, the coat that you are wearing to Court today, where was that purchased, and when?

A. I got that at Jean Dessay's in Paris.

Q. How much was paid for that?

A. That was $600.

Q. When was that purchased?

A. In 1951.

Q. Now, Mrs. Vanderbilt, were there any expenditures made on pets, dogs or cats during this period?

A. Yes, two extremely expensive dogs. The overall cost [fol. 558] on them was about $3,000, two wire hairs that we brought from London. They were puppies and we had a lot of medical things involved in order to take them out of England and then to bring them here. There was a lot of medical expense, and then—I don't know—they had to have a fare on the boat, the two of them, separate fare, and I think that was $100 or $200.

Then through customs here in New York and a lot of medical care here, and specially built fences, and all kinds of things in California on them, and then we had to fly them to Washington, and Neil gave them to his doctor there because we could not keep them in any place.

Mr. Winsten: Now will the Court continue to exclude any testimony of expenditures made with respect to the plaintiff's daughter for her schooling and education and clothing and maintenance during that period?

The Court: For what purpose?

Mr. Winsten: For the purpose of showing expenditures by the defendant and his mode of living.

The Witness: He spent it.

Mr. Winsten: Just a minute.

The Court: His mode of living can only be in connection with this plaintiff.

Mr. Winsten: It is some clue to his income, if your Honor pleases.

The Court: All the testimony you have given so far, with the figures that she has given us certainly does not indicate that he did not, that he was not spending a lot of money.

Mr. Winsten: I won't press it, your Honor.

[fol. 559] The Court: I say, if that is the purpose, you have certainly not indicated by her testimony that he is not a spender of a lot of money, if he spends $3,000 on a dog or two dogs and the other items. He is not a man that does not spend large sums of money during the time that they lived together.

Q. Did the expenditures that you have given us up to now include expenditures made by the defendant in connection with the maintenance and education of your daughter Nanette?

A. No, that is not included.

The Court: It included the nurse, the maid, the food, the transportation to and from these various places. I suppose that the only item left out is how much he paid for schooling.

Mr. Winsten: Schooling, entertainment and clothing, your Honor, yes.

Q. Did the defendant make expenditures in connection with clothes, entertainment and the education of your daughter?

A. Yes.

Q. Now, Mrs. Vanderbilt, you are asking for an allowance for your support and maintenance, is that right?

A. Yes, sir.

Q. You are asking for that allowance to be made retroactive to the commencement of this action?

A. Yes.

Q. Do you have any property of your own at this time?

A. None, except a few personal clothing and things of that sort.

Q. Do you have any income of your own at this time?

A. No.

[fol. 560] Q. And how are you being presently supported and maintained?

A. By a charitable organization.

Q. How much are you asking this Court to allow you for your maintenance and support?

A. Well, I need, from what I have analyzed, $2,655 a year—I mean, a month.

Q. And is that what you are asking for at this time?

A. Yes. I would like also——

Q. Does that include any extraordinary medical or surgical expense that you may be put to?

A. No, no, no.

Q. Does that include any—I withdraw that. Are you presently in need of dental care?

A. Yes, I am.

Q. Were you able—did you have any dental care during the past two years?

A. I have not been able to, no.

Q. Well, is the condition of your mouth such that you are in need of dental care now?

A. Well, it was in early 1954, and I could not have it done, because of my headache and my neck, and it was several hundred dollars worth analyzed already at that time, and it has gotten steadily worse. I don't know what it is right now.

Q. This amount that you are asking, does that amount that you are asking, $2,655, take into consideration income tax that you may be required to pay on any allowance that you are given by the Court?

A. No.

Mr. Winsten: That's all.

Cross-examination.

By Mr. Rosenblatt:

Q. Madam, how much did you get a month during the period of your marriage as a gift from the defendant's mother?

A. How much did I get from his mother?

[fol. 561] Q. A month?

A. Well, I don't think that I got it for the entire period of time, but I think for most of it I got one check for $800—$833—and another one for $200 through Mrs. Van Name's office.

Q. Do you tell the Court now that you got about $1,000 a month.

A. From those two checks.

Q. Did you get any other moneys?

A. Oh, yes.

Q. I am talking about the monthly gift made to you and Mr. Vanderbilt by his mother. Didn't you tell the Court that you got $1,300 a month during the course of this trial?

A. I have said—yes, that's from Mrs. Van Name. That's a completely different thing.

Q. Wasn't Mrs. Van Name Mrs. Vanderbilt Sr.'s secretary?

A. Yes, that's right.

Q. So that when you got money from Mrs. Van Name, that was money from Mrs. Vanderbilt Sr., wasn't it?

A. Well, I guess it is.

Q. Don't you know?

A. I presume it is, Mr. Rosenblatt.

Q. Don't presume. Don't you know? Did you get money from Mrs. Van Name individually?

A. No.

Q. So that whatever moneys came from Mrs. Van Name came from Mrs. Vanderbilt Sr., didn't it?

A. She was her fiscal secretary, that's right. I only saw Mrs. Van Name because her name was on the check.

Q. But it was Mrs. Vanderbilt Sr.'s money?

A. I should think so, yes.

Q. As a matter of fact, you got that money from the time right after your marriage in September of 1948 right through the month of September 1952, didn't you?

A. No.

Q. An allowance?

A. No, sir.

Q. You now change your testimony in this case?

A. Is that my testimony, sir?

[fol. 562] Q. You said that you got $1,300 a month. Now it is $1,000 and it is not for the entire period. Which is it, Mrs. Vanderbilt?

A. I got a check for $833.33 and another one for $200.

Q. Where did the figure of $1,300 a month come from, Mrs. Vanderbilt?

A. I don't know.

Q. You never heard it before in this case?

A. The only thing I know is there were those two checks. Now, if I said $1,300 instead of $1,000, well, there is where the mix-up comes in because $833 plus $200 is $1,033.33, or something. If you write it down you will see what I mean.

The Court: In other words, you made a mistake, is that it? So you say you made a mistake?

The Witness: Yes, sir. Those two are definitely the checks.

Q. Were those moneys that you got from the defendant's mother used for the purposes of both you and Mr. Vanderbilt?

A. They were used generally, that's right.

Q. And actually you people counted on the receipt of those moneys, didn't you? As part of your budget?

A. Oh, I don't know specifically that we did.

Q. You did not count on that?

A. I rarely knew what to count on particularly. I mean, I don't know what you mean.

Q. You did not look forward each month to the receipt next month of additional moneys from Mrs. Vanderbilt Sr.?

A. Well, I don't know that I particularly thought about it.

Q. Didn't you depend in making your calculations with [fol. 563] your husband, didn't you depend on an allowance from his mother as part of the money for your living expenses?

A. I don't know—did I or did he?

Q. I am talking about you, Madam.

A. I depended upon my husband. I was not depending on his mother.

Q. And you didn't know where he was depending, is that what you want us to think?

A. Well, now, I don't want you to think——

Q. I don't want you to fence with me, Madam. Just say you don't know if you don't know.

A. I do know.

Q. Don't you know then, that Mr. Vanderbilt counted on the allowance from his mother as part of the moneys available for your joint things and for whatever expenses there were?

A. I did know that he got a lot of money from her, but I also knew that he had estate money and other moneys.

Q. I am only talking about the moneys that came from his mother. Didn't he count on those moneys?

A. I don't know what you want from me. How am I supposed to say what he counted on?

Q. I ask you if you knew and you said you knew that he did. Now do you say that you know that he did not?

A. Have I said that? Will you please read it to me?

Q. Madam, you testified here for an hour with respect to expenditures. I want to know now—and just answer yes or no—whether you and your husband during the time that you lived together counted on moneys from his mother in addition to whatever other money he might have?

Mr. Winsten: I think counsel should indicate what he means by "count on." I think that is the difficulty that the witness is having with the question.

The Court: Let her answer if she can.

[fol. 564] A. It is hard to answer that he was counting on so much a month. I knew that he got money from her and I knew that he anticipated getting money from her.

Q. Tell me, did he get more than the $1,033 a month as gifts from his mother during the time that you lived together?

A. I believe so.

Q. Do you know whether he got any of the trips?

A. No.

Q. Do you know whether he got any of the transportation to and from California?

A. I don't know about that.

Q. Well, what other moneys did he get besides this monthly allowance?

A. I cannot tell you.

Q. But you know that there were other moneys?

A. Yes.

Q. Now, after you were married you and he made a joint income tax return or returns, didn't you?

A. I never made a thing. I signed a paper.

Q. And you never knew what was in it?

A. I couldn't even hardly read that.

Q. And you never knew what was in any of them?

A. No.

Q. You never heard of them?

A. They were prepared, as far as I know, by lawyers.

Q. But you never saw any of them?

A. I must have seen them when I signed them. I just did not pay attention to it.

Q. And then, after that you completely forgot them, is that right?

Mr. Winsten: That is not what she testified, your Honor.

Mr. Rosenblatt: Let her testify.

Mr. Winsten: Don't incorporate something in a question that was never testified to.

[fol. 563] Mr. Rosenblatt: This is cross-examination, your Honor.

The Court: The next question is did you completely forget about them after that, yes or no?

Q. After you signed them?

A. I cannot say I completely forgot. Nobody can forget.

Q. Do you remember anything that was in any of them?

A. No, not particularly, no.

Q. Did you ever keep any copies of them?

A. I don't know.

Q. Did you ever give Mr. Winsten any copies of them?

A. I don't think so.

Q. Did you ever give any other lawyer that you had any copies of that?

A. I don't know what I gave the lawyers in the first place because I just sent them a whole raft of things. I hardly knew what was in them. I sent it to them to do with what was necessary. I don't know all what was in them.

Mr. Rosenblatt: I wish to read now from page 19, at the bottom, to the top of page 20, folios 57 and 58 of Mrs. Vanderbilt's affidavit sworn to on the 19th day of June, 1954.

Mr. Winsten: What page was that?

Mr. Rosenblatt: Page 19, paragraph 33, in her affidavit.

"The income of the defendant from the above mentioned trusts numbered one and two, is in excess of $40,000 annually. A joint U. S. income tax return filed by me and the defendant for 1951 discloses that the defendant's income from trusts numbered one and two above described totaled $41,826.67."

[fol. 566] Q. Did you make that statement, Mrs. Vanderbilt?

A. If it is my affidavit, I made it, yes.

Q. And was it true?

A. I guess it is.

Q. Now, may I have that income tax return for 1951?

A. I don't know where it is.

Mr. Rosenblatt: Well, I call for its production, your Honor.

Mr. Winsten: I don't have it.

Mr. Rosenblatt: Right in this court room.

Mr. Winsten: I don't have that at all.

Mr. Rosenblatt: As part of his services he said that he prepared all these affidavits in this case.

Mr. Winsten: Yes; and this affidavit was prepared from other—this information was prepared from other data. I did not have the income tax returns, but there were notations from which I got that.

Q. I would like to show you the taxpayer's copy which has the stamp of the California individual income tax return for the calendar year 1950, calling your attention to "Patricia Wallace Vanderbilt, c/o Kenny and Morse, 215 North Hope Street, Los Angeles 12, California," and ask you if this is a true copy of that return filed for that year by you?

A. I cannot possibly recognize it. It does not have my signature on it and I don't know anything about a taxpayer's copy.

Q. Now, tell me what was the defendant's income from trusts numbered one and two in the year 1950?

A. Oh, I don't know that, Mr. Rosenblatt. As far as I can recall, I heard him state that from his estate moneys he would get around 40, 50 thousand dollars a year.

[fol. 567] Q. Now, will you be good enough to tell me the breakdown of this amount of $41,082.67 sworn to by you for the year 1951?

A. What's that?

Q. I am reading from your affidavit.

A. Oh, I know, sir, but please—may I see it, or something?

Q. Yes, you may see it. It is paragraph 33, at the bottom of the page, and it carries over to the end of the paragraph at the top of the next page.

A. How do you mean—what is the question again?

Q. I want to know the breakdown between those two trusts?

A. Oh, I couldn't possibly tell you.

Q. You signed the tax return, you gave the information to the Court. Now tell us how you broke it down?

A. Well, these—when is this dated?

Q. June 19, 1954.

A. Well, this is all information from banks, and so forth.

Q. Let me have it back, please. What information from what banks did you get in making the joint return filed by you and by your husband in 1951?

A. What did I get? I don't understand what you mean.

Mr. Rosenblatt: Read it back to her.

The Stenographer: "Q. What information from what banks did you get in making the joint return filed by you and by your husband in 1951?"

Mr. Winsten: There is no testimony that she ever made a joint return.

Mr. Rosenblatt: Only her sworn statement, your Honor.

Mr. Winsten: The sworn statement says something that information is contained in the return.

Mr. Rosenblatt: I beg your pardon. It says here, a joint United States return, tax return, filed by me and the defendant for 1951.

[fol. 568] Mr. Winsten: Your question says, "made by you".

The Court: Do you want to change it by saying, "filed by you"?

Mr. Rosenblatt: Oh, yes.

The Court: All right go ahead.

The Witness: What was I doing then? I don't know what you mean.

Mr. Rosenblatt: Read the question back with the word "filed" instead of "made", please.

The Stenographer: "Q. What information from what

banks did you get in filing the joint return filed by you and by your husband for 1951?"

The Witness: I don't know how to say that, how to answer that question because the lawyer's office, as far as I know, in all the years made, actually did the income tax, and then we signed it, and I think that the information—this affidavit that you are talking about—when is it, June 1954, Mr. Rosenblatt?

Q. Have you finished the answer?

A. No, but you are talking about an affidavit that I made in June, 1954. Now, that affidavit was made on the basis of other proceedings and other information, as far as I recall. After all, I mean Mr. Winsten's office was doing all these things for me—I mean, there is a lot of information that was gathered in other testimony and other things.

Q. Now Mrs. Vanderbilt, during the period that your husband and you lived together from September 1948 to September 1952, what were the sources of his income [fol. 569] besides any gifts from his mother? Where did he get his money?

A. Well, he had the estates.

Q. What estates? You mean trusts?

A. Well, whatever they are. They are trust moneys, I guess. They come through two different banks, and then he had——

Q. Just stop there, please. Are you referring to a trust under the will of Cornelius Vanderbilt administered by the United States Trust Company, and a trust under the will of Alice G. Vanderbilt, defendant's grandmother, administered by the Hanover Bank; those are the two trusts you are talking about?

A. Well, I guess so, yes. Are they two different banks? They are supposed to be two different banks.

Q. And will you tell us whether or not until Mr. Vanderbilt's mother died in January of 1953, did he have any other trust incomes besides the income from those two trusts?

A. Well now, I don't know as of my personal knowledge, but I do know that he had a box at the Guarantee Trust Bank.

Mr. Rosenblatt: Now I move to strike that out, your Honor.

The Witness: Well, I know it.

Q. I am asking you whether you know whether he ever got any other trust moneys from any other trusts besides these two before his mother died?

A. I don't know.

Mr. Winsten: I think the best person qualified to answer that is the defendant himself, your Honor.

Mr. Rosenblatt: Oh, Mr. Winsten, don't interfere with my cross-examination.

[fol. 570] Mr. Winsten: I have a right to object to the question, I'm sorry.

Mr. Rosenblatt: May it please the Court, the affidavit of some fellow named Manierre of the Hanover Bank says that in the year 1951 the income paid to the defendant by the Hanover Bank under the last will and testament of Alice G. Vanderbilt as supplemented and continued under the last will and testament of Cornelius Vanderbilt—there are the two trusts——

The Witness: No, no, there is more.

Mr. Winsten: That is one trust.

The Witness: This is only one.

Mr. Rosenblatt: On that one trust the amount of income for 1951 was $35,664.76.

Q. Do you know anything about that, Mrs. Vanderbilt?

A. I don't know a thing about what you are holding in your hand. Whose is that?

Q. I merely asked about the figure.

A. No, I don't know that figure.

Mr. Winsten: That is in evidence, if your Honor please.

Mr. Rosenblatt: I am asking her for her knowledge. She knows about an awful lot of things.

The Court: Go ahead.

Q. Now, can you tell me whether you know anything about the $35,000 figure that I just read?

A. I don't know details, Mr. Rosenblatt. I just saw it in the overall picture. I mean, Neil never talked about

things of this trust or that trust. He talked about the overall sort of trust idea, or what would you say.

[fol. 571] Q. And did you know he was also in business during the period from 1948 to 1952?

A. Well, I knew he had several activities.

Q. Did you know he got income from any of them?

A. I knew that he got paid for lectures from time to time, and I knew——

Q. And that you got income also?

A. I made one endorsement a year for approximately $3,000.

Q. Now, did you know that on the joint tax return that you signed he took off deductions for his business expenses which included the costs of travel and for expenditures of a similar type incurred in connection with his business?

Mr. Winsten: That is objected to, if your Honor please as an attempt by counsel to get into evidence a self-serving statement made by the defendant.

The Court: He is asking her if she knows whether he made certain deductions.

Q. Did you know that?

A. I was not in on any of the preparations of income tax. I saw him write down figures once a week on—or once a day; or however often he would do it, which he would send in to the lawyers. Now, how these things were done in the lawyer's office, I cannot tell you.

Q. What was the purpose of his sending in those figures?

A. As far as I know they were supposed to be deducted, or something.

Q. And were those figures for business travel?

A. Well, that is hard to say.

Q. Do you know of any amounts that he sent in to the lawyer's office representing expenses for business travel?

A. I don't know of any specific amounts, no.

[fol. 572] Q. Did he send in any that you know of, any records of the travel expenses?

A. I really cannot tell you anything specific about it, Mr. Rosenblatt. I do know that he took off a lot of things on the tax.

Q. Well, did he take off things for business entertainment, do you know?

A. I don't know.

Q. Did he ever tell you about it?

A. I don't recall anything specific about it.

Q. Did he tell you about taking off deductions for films and camera work?

A. I think he did take it off, yes.

Q. Did he tell anything about taking off deductions for his telephone and telegraph in connection with his business?

Mr. Winsten: If your Honor please, I object to these questions, to the form of the questions particularly on this following ground: that whatever the defendant told the plaintiff is not necessarily a fact. The mere fact that the defendant may have told the plaintiff something does not make it any more competent than any other self-serving statement or declaration.

Mr. Rosenblatt: I did not file that return. She filed it with him. I am asking about the contents of the return that she filed and that she referred to in a sworn affidavit.

The Court: She is not referring to the contents of any return. You are asking her for what she knows, and if she knows, I will allow it.

Mr. Rosenblatt: I want to know whether she knows what expenditures were taken as deductions by the defendant.

[fol. 573] Mr. Winsten: She has already testified that she did not know.

Mr. Rosenblatt: I beg your pardon. She just testified that she thought that he did take off for films and camera work.

The Court: Go ahead.

Q. Did he take off for telephone and telegraph, if you know.

A. I really don't know all that, Mr. Rosenblatt.

Q. Did he take off for secretary that he employed?

A. Oh, I don't know.

Q. You don't know?

A. How can I know?

Q. Did he take off for car expense used in his business?

A. I don't know.

Q. Did he take off for any assistants that he may have employed?

A. Any what?

Q. Assistants.

A. What do you mean?

Q Who aided him or assisted him in any way.

A. Anybody who assisted him?

The Court: Any employees of his. Did he pay employees that helped him?

The Witness: Yes, he had people from time to time cutting film, and that sort of thing. I don't know what he took off on income tax.

Q. Do you know whether he took off any deductions for the florists?

A. Well—I don't know.

Q. Or storage charges?

A. I don't know.

Q. Do you know whether he had any business debts?

A. You will have to explain that.

Q. Did he have any judgments against him?

A. Yes, he had from way back in 1928 sometime. He had one or two that I knew about.

[fol. 574] Q. Do you know whether he was paying off those judgment creditors during the entire time that you were married to him?

A. Well, I don't know all the details about who or what he was paying. I knew that he was involved in supplementary proceedings concerning a couple of different people here in New York, and I knew that he had had in the past paid judgment creditors. Now, what he was paying during that time I don't know.

Q. And you don't know whether he was paying off creditors during the very time that you were married to him?

A. Well, I knew of one very definitely that he was paying $3,500 a year to, to a man in California, but that was for libel and slander. That was for the newspaper thing.

Q. Do you know whether or not Mr. Vanderbilt except from his lectures, except from these two trusts, and except for the money received from his mother, had any other income during the time you and he lived together to September, 1952? Just tell me first if you know. Besides those three things, do you know?

A. Other income?

Q. Yes.

A. Yes.
Q. You do know that he had other income?
A. Well, I know of other things.
Q. Well, now tell us about it.
A. Well, he made several endorsements.
Q. Like you did?
A. Yes—not the same company, I mean, not cosmetics.
Q. He endorsed products?
A. That's right.
Q. Do you know what he got for it?
A. I don't know.
Q. Do you know whether it was for charity?
A. Oh, no.
Q. What else, Mrs. Vanderbilt?
A. And then for television appearances, sometimes he got paid and sometimes he did not. I don't know what the [fol. 575] picture on that is. Then the lecture money, I don't know the over-all total on that.

By the Court:

Q. Did he ever discuss the amount of money that he received on the lectures?
A. I only knew the range.

By Mr. Rosenblatt:

Q. Did he ever discuss the amount of money he received on the lectures?
A. I told you that they can go anywhere from $300 for a small group of women in a club on up to $1,500 in a large hall.
Q. How many lectures would you say he delivered a year while he was married to you?
A. Well, that starts in October, and then he has about two or three weeks off around the holidays, and then it runs into April or May.
Q. I say how many a year would you say he had while he was married to you?
A. Well, you see, he does not lecture all year.
Q. I don't say all year. How many lectures during the year?
A. Well, he would have three or four a week sometimes,

in October and November, and half of December, and then again late January.

Q. Can you give us an approximate figure?

A. I am trying to find out how many months that is.

Q. There are twelve months in a year.

A. He did not work every month.

Q. Well, how many months did he work?

A. I would say, five months is how many weeks, now? It is about twenty weeks, and I would say on an average, I suppose, two and three a week, I don't know, more or less, it is hard to tell.

Q. Did you know that he had substantial expenses in [fol. 576] connection with his lectures and his appearances before these clubs?

A. I knew that he went by train, yes, and he stayed in hotels. That is in addition to when I would be in California.

Q. Now, I want to ask you whether or not these moneys which you heard testified concerning this morning as Mr. Vanderbilt's receipts from his mother's estate, whether he had the use of any of those moneys during the time that you were married to him and lived with him?

A. I don't understand that at all.

Mr. Rosenblatt: You better read it back to her.

The Stenographer: "Q. Now, I want to ask you whether or not these moneys which you heard testified concerning this morning as Mr. Vanderbilt's receipts from his mother's estate, whether he had the use of any of those moneys during the time that you were married to him and lived with him?"

The Witness: That is a very difficult and long question.

The Court: Well, you heard the representative of the bank testify that he was getting some money from his father's estate for a while, and then later his mother's estate. During the time that he lived with you, do you know whether he got the use of that money?

The Witness: Well, of course, from his father's estate he had money, and from his grandmother's, and then he got other moneys directly from his mother.

Q. And that was after you and he were no longer living together, isn't that so?

A. No, no, no.

[fol. 577] Q. When did he get that?

A. What?

Q. The money, from his mother, from his mother's estate?

A. I am talking—oh, her estate?

The Court: You mean the monthly allowance that she was getting; is that it?

The Witness: We got, in addition to that monthly business—I don't know whether you mean from her estate now, since she died——

Q. Did you have any moneys from her estate before she died?

A. How can she have an estate? I mean, I don't know what you mean.

Q. Is it a fair statement that everything that he got, whether by way of capital or income after his mother died, that neither you nor he had any enjoyment of that during the time that you lived together up to September, 1952?

A. Oh, no, that is not correct at all.

Q. Well, now tell us what did he get from his mother's estate.

The Court: She died in 1953, didn't she?

Mr. Rosenblatt: She died in January, 1953. Your Honor has permitted——

The Court: You said 1952.

Mr. Rosenblatt: I said during the period that they lived together up to September, 1952; that's right.

The Court: She was alive at that time, wasn't she?

Mr. Rosenblatt: Sure she was.

The Court: How could she get any benefit from her estate if she were alive?

Mr. Rosenblatt: That's what I am trying to find out.

[fol. 578] The Court: Let us not confuse the record.

The Witness: We lived with her for many, many months, off and on. We had the entire use of that house.

Q. I was going to come to that, madam. I want to know now about income, aside from the gifts of various kinds and the monthly allowance.

A. I don't know what you are talking about.

Mr. Rosenblatt: May it please the Court, one of the subjects that has been before your Honor here has been a

detailed statement before your Honor by various witnesses of what has come into the possession of the defendant, either through himself or through sequestrators or receivers, or howsoever; and I direct your Honor's attention to the fact that all of that has come in since the date of death of his mother, January 7, 1953.

The Witness: No, sir.

Mr. Rosenblatt: And did not exist—please, madam—and did not exist at the time these people lived together, which concededly ended December, 1952.

Mr. Winsten: There is no dispute about that. That has all been put into evidence to indicate what wealth the defendant now possesses. There is no claim that he got any part of his mother's estate before she died.

Mr. Rosenblatt: May it please your Honor——

The Court: There was no estate before she died.

Mr. Rosenblatt: Of course; and the point that I am mak-[fol. 579] ing is that everything has been based there on what has come into his possession since the time they concededly have never lived together.

The Court: I am aware of that, but the point made here, from what I gather—and if I am wrong, correct me—is that during the time these people were living together this man has had the use of the moneys as she described to the extent of the expenditures that they have made during that period of time. Where he got the money and how he got the money, whether it was income or not, that's the problem.

Mr. Rosenblatt: And now we will go into that question, your Honor.

The Court: All right. In 1948, according to the witness for the United States Trust Company——

Mr. Winsten: That's Mr. West.

The Court: That's right, Mr. West. From 1948 to 1952 there was an average of ten, eleven thousand dollar a year gross.

The Witness: That is on one thing only.

The Court: On the estate of Cornelius Vanderbilt.

Mr. Winsten: Yes, your Honor.

The Court: That's not the Grace G. Vanderbilt.

Mr. Winsten: No.

The Court: Those funds came in in 1954.

Mr. Winsten: 1953 or 1954.

The Court: Now, what else have you got?

The Witness: There is the Alice Vanderbilt estate, his grandmother.

Mr. Rosenblatt: That was that affidavit that I was referring to, which is also——

[fol. 580] Mr. Winsten: That is the Hanover Bank affidavit.

The Court: That is Mr. Manierre. That's another one where he got in those years approximately $32,000 or $33,000 a year after 1952.

The Witness: But, sir, I think there is something wrong there.

Q. Now, you were married on September 7, 1948?

A. That's right.

Q. And after your marriage you lived at the home of the defendant's mother in New York at 1048 Fifth Avenue?

A. Yes.

Q. Did you pay any rent?

A. No.

Q. At any time during the marriage that you spent in New York did you spend the time at the home of the defendant's mother, from 1948, September, to September, 1952; any time you were in New York were you in the home of the defendant's mother?

A. Whenever we were in New York we lived at 1048.

Q. And did you ever pay rent during that period of time?

A. No.

Q. Now, when you went to Florida in the fall of 1948 and to the beginning of 1949, you travelled by car, didn't you?

A. Well, not completely.

Q. I thought you once testified, madam, that you had gone to Chicago and then left by car, drove to Florida, lived in Florida, taking motion pictures, or something in connection with his lectures.

A. Mr. Rosenblatt, you are grouping my husband's testimony and another witness' all together.

Q. You tell me how did you get to Florida?

A. Mr. Vanderbilt and Mr. Edson were in the car, and it is my recollection now that Nanette and I some-

[fol. 581] how got to Savannah, Georgia. I cannot recall how, except we were not in the car.

Q. Were you in a car after Savannah, Georgia?

A. And then we drove down to the West Coast of Florida.

Q. And when you got to the West Coast of Florida where did you stay?

A. We did not really stay there. We spent nights on the road travelling. We did not stay on the West Coast of Florida. We cut across somewhere along the line and went straight to Fort Lauderdale, and that is where we stayed.

Q. And where did you stay in Fort Lauderdale?

A. I cannot tell you the name of that place.

Q. Wasn't it a motel?

A. No, no. It is a great, huge resort place that an old friend of Neil's owns and runs.

Q. And did you pay rent there?

A. Oh, yes.

Q. Tell us the name of it.

A. I cannot tell you; I don't remember.

Q. And where did you go from there?

A. I just said I don't know. We moved down the coast somewhere. It is along the coast. It is between—what is it? Hollywood Beach and Miami Beach, now somewhere in the middle there. It is a great big, new hotel.

The Court: Golden Strand?

The Witness: Some one of those.

Q. Is that hotel different than the one in Fort Lauderdale?

A. Yes; of course it is different.

Q. And during the period that you were in Florida was the defendant taking motion picture film?

A. Well, actually not much after that time. He took some, but very little.

[fol. 582] Q. And when you went to Chicago, did you stay in Chicago while the defendant traveled to give his lectures?

A. I stayed in Chicago most of the time. I went out with him on occasion for the lectures.

Q. Is it a fair statement to say that you were in Chicago during the time that he gave his lectures in the Middle West?

A. Well, now, when, just that period? No other year did I stay in Chicago.

Q. I am talking about when you did stay in Chicago, which I take it was the early part of 1949.

A. I have already said that it was about a month late in 1949 and about another month or two early—I mean 1948 and 1949. It is in there because there was the trip to Florida in between the Chicago stay.

Q. But he was giving his lectures while you were living in Chicago, some of which you accompanied him on?

A. He gave some, yes, not many that year.

Q. Now, tell me, you say that either in 1950 or 1951 you and he looked for an apartment in New York?

A. That's right.

Q. And that he told you that he wanted to live in the area of Park and Fifth Avenue from—where—around the 60's, would you say, up to 86th or something?

A. Around the 60's, above the Hotel Pierre, and on up to around 86th Street, around there.

Q. Now, his mother lived on 86th Street and Fifth Avenue, didn't she?

A. That's right.

Q. That is the location of 1048 Fifth Avenue?

A. That's right.

Q. And you say that he wanted to live there because this was the area which contained his family and his friends?

A. That's right.

Q. Now, tell me who in that area comprised your family and your friends.

[fol. 583] Mr. Winsten: That is objected to as incompetent, irrelevant, and immaterial.

Mr. Rosenblatt: I don't see the incompetency, irrelevancy, or immateriality of it, your Honor.

Mr. Winsten: If this witness has or has not any friends in that area.

The Court: I will let her answer.

A. Well, that's exactly the same people that he knew. That's where we circulated.

Q. You want the Court to understand that his family are your family and his friends your friends?

A. Well, I should hope so. They were about the only people I was seeing.

Q. Now, tell me, who are your friends in that area right now?

A. Oh, Gee——

Q. Just name one.

A. Well, his sister is in that area.

Q. You visited with his sister?

A. Certainly.

Q. When was the last time you saw her?

A. Well, I have not seen her since the start of all this.

Q. And that is since the fall of 1952?

A. That's right.

Q. Now, who else?

A. I cannot remember all their names. I have not seen any of them, not now.

Q. Is it a fair statement——

A. There are all kinds of people—the Ogden Hammonds and——

Q. Is Mr. Ogden Hammond a friend of yours?

A. Practically all of these people were in and out of 1048, from day to day. You understand, there were large crowds of people there. They were there for dinner, tea and lunch; and then they would ask us to places. The Jimmie Becks are in that area. Now, you know Jimmie Beck yourself, so don't you tell me about him.

[fol. 584] Mr. Rosenblatt: Would your Honor please have that stricken?

The Court: Strike it out.

Q. Is Jimmie Beck a friend of yours?

A. Not particularly.

Q. Are any of these people friends of yours in the sense that we use normally the word "friends," rather than acquaintances?

A. Well, Mrs. Jack Astor.

Q. Where does she live?

A. Well, it is right directly across from the Metropolitan Museum at that time.

Q. What time was that?

A. Well, from 1948 up until—I don't know when she left there, now.

Q. When was the last time that you were in New York before November or December of 1952?

A. Well, I was here early in January, 1952.

Q. Well, in January of 1952 the people that you say are friends in that area, from the Pierre Hotel at 61st Street and Fifth Avenue, all the way up to 86th Street, and over to Park Avenue and down, tell me, who are the friends that you have seen since January of 1952 in that area?

A. Who have I seen? I have been in no condition to see anyone, Mr. Rosenblatt.

Q. I just asked whom you have seen.

A. I have seen Mrs. Peg Rossiter.

Q. Where does she live?

A. She used to live on Park Avenue and she now lives right off of Park Avenue, the Waldorf. It is a small hotel and she has an apartment there. I cannot remember the name of it.

Q. Is she your friend?

A. She is friendly toward me, so far as I can see.

Q. When is the last time you saw her?

A. Well, I guess last year sometime.

[fol. 585] Can you name other people that you visited in that area who are your friends?

A. I just have not been visiting anybody in the last two years. I have been in no physical condition to.

Q. Is it a fair statement that you have not visited any of these people since the fall of 1952?

A. No. I have seen Mrs. Rossiter.

Q. And what is her—is she married—Mrs. Rossiter?

A. And Oliver Holden, too, is an old friend of mine; and Mrs. Julia Redmond on Park Avenue.

Q. Tell me, do you have friends in any other area in New York beside this area that was described here?

A. Well, I discovered one I had not known to be up there in 1953. I discovered that there were some people here I had not known they were here before.

Q. Tell me where they live. I don't even ask for their names.

A. Well, that's Mrs. O'Donnell at the Hotel Ansonia. There are all kinds of people. I don't know what you want from me.

Q. I merely want to show where they are located, the

area that they are located in New York. Mrs. O'Donnell, if she lives at the Ansonia Hotel, lives over on Broadway and 72nd Street, isn't that right?

A. It's around there, yes.

Q. And where are your other friends in New York, where do they live?

A. I told you I hardly see anybody now.

Q. How many friends would you say that you have in the entire City of New York?

A. Oh, I don't know, Mr. Rosenblatt. For the past two years I have just been in bed practically or in court, one or the other.

Q. Can you tell me how many?

A. No. I have over 300 people at the hotel, the East End, who are my friends.

[fol. 586] Q. At the hotel where?

A. East End, a large bunch of girls.

Q. When was this? When did this come about?

A. Well, I stayed there practically all last year.

Q. I mean you did not know them before you stayed there?

A. No.

Q. Is that a fair statement?

A. I did not know any of them.

Q. As a matter of fact, your friends, as distingnished from acquaintances—and I am talking about you personally; Mrs. Vanderbilt—were located or are located in California rather than in New York, isn't that so?

A. No. You are a little peculiar. I have friends starting from Honolulu, Hawaii, all along through France and Germany, all over the world, halfway. I don't know what you mean.

Q. Did you ever see France or Germany before you married Mr. Vanderbilt?

A. No, I did not; but I certainly hope that I picked up a few friends along the line.

Q. Tell me, Mrs. Vanderbilt, is it a fair statement that you have got more friends in the State of California than in the State of New York?

A. I would not know how to say such a thing.

Q. Well, is it a fact?

Mr. Winsten: While I am not objecting to this, I do not see the materiality of it.

Mr. Rosenblatt: May it please your Honor——

The Court: You may ask the question.

Q. Tell me, Mrs. Vanderbilt, have you ever been in the apartments of the modern housing project in the Chelsea area of New York?

A. I never heard of it, no.

[fol. 587] Q. You never heard of it?

A. Never.

Q. Have you ever been in the apartments in and around Gramercy Park?

A. No.

Q. Did you ever hear of them?

A. Where is that?

Q. Tell me, have you ever been in the apartments over on Riverside Drive from 72nd Street up, going north?

A. No.

Q. Are you familiar with the development on West 23rd Street, an enormous housing development of splendid apartments?

A. No.

Q. You are not familiar with them?

A. No.

Q. Do you know anything about the apartments in the suburbs of New York City?

A. No, I do not.

Q. Do you know anything about the rentals of apartments in the areas in New York other than this particular area from 61st Street up to 86th Street?

A. That's the only place that we wanted to look at at that time. I did not look any place else. He did not want to look any place else.

Q. Tell me, in the period that you were in New York City, and excluding any nurse for your daughter, did you have any other servants?

A. Well, it depends on how you want to look at it. The two maids that took care of me and my daughter, I gave sums to.

Q. You mean as gratuities?

A. Whatever you want to call it.

Q. I mean they were paid by Mrs. Vanderbilt, Senior, weren't they?

A. I paid them on my own, too.

Q. That was in addition to their wages? You did not pay their wages, did you?

A. Well, I gave them what I thought was fair, I suppose, for the extra care. Then Neil also paid one or two men [fol. 588] in the house in addition to their—well I guess they were getting other salaries, and then he had—part time we had a man with him all the time. That Marshal Edson was with him.

Q. In view of the fact that we are about to adjourn, as I understand from his Honor, would you be good enough to have ready here tomorrow morning a computation showing the total amount of the anual expenditures that you say were made here for the years 1949, 1950, 1951, and up to September, 1952?

Mr. Winsten: She has testified to all of that, if your Honor please.

The Court: Yes, she has already testified to that.

Mr. Rosenblatt: We can shorten this a little bit if she will compile the total amount. I don't want an argument when I say that she has given amounts totalling X dollars.

Mr. Winsten: The witness does not have to make any computation for Mr. Rosenblatt.

Q. And will you be good enough also to bring to court tomorrow morning whatever data or information from whatever source whatsoever you have upon which you based the sworn statement in your affidavit of June 24th, 1954, relating to the 1951 joint tax return?

Mr. Rosenblatt: May I have your Honor please direct the production of such material in this courtroom?

Mr. Winsten: I object to that, your Honor.

[fol. 589] The Court: You may cross-examine her on it, and for whatever it is worth. Counsel stated that he got that from compiling or from some information.

Mr. Winsten: I will give him whatever data I have, and I will tell you where I got it from.

The Court: All right, tomorrow morning at ten o'clock, gentlemen.

(Whereupon the trial was adjourned until the following day, January 25, 1955, at 10:00 A.M.)

New York, N. Y., January 25, 1955,
10:00 o'clock A.M.

TRIAL CONTINUED

Appearances: (Same as previously.)

Mr. Rosenblatt: If your Honor please, I would like to interrupt this cross-examination to put on a witness to identify two tax returns, if I may.

The Court: Surely.

JACK C. BONDEROW, called as a witness in behalf of the defendant, being first duly sworn, testified as follows:

(The witness stated that he resides at No. 122 Highridge Road, New Rochelle, New York.)

Mr. Winsten: Is this a rebuttal witness, your Honor? [fol. 590] The Court: No, we are taking him out of turn.

Mr. Winsten: I just want to know if he is.

Mr. Rosenblatt: Just to identify two tax returns.

Direct examination.

By Mr. Rosenblatt:

Q. Mr. Bonderow, what is your occupation?

A. Certified Public Accountant of the State of New York.

Q. Where is your office?

A. 295 Madison Avenue.

Q. I show you a paper which is part of Defendant's Exhibit K for identification, purporting to be an individual

tax return for the year 1949, and ask you if you can identify it.

A. I would just like to conform it to my copy, if I may, to make sure it is the same one. Yes, sir, I can identify this.

Q. Where did you see this before today?

A. This copy here, sir?

Q. Yes.

A. I did not see this copy. I always had a copy in my files.

Q. May I have the copy in your file and ask you where you got this copy?

A. Yes, sir, that copy was given to me by Mr. Vanderbilt himself, and I believe it came from your office at the time.

Q. Did you have any discussion with any official of the United States Government in connection with this 1949 paper?

A. Yes, sir. There was a——

Mr. Winsten: Just a moment. The answer should be yes or no at this point.

Mr. Rosenblatt: That's right.

Q. Just say yes or no.

A. Yes.

Q. And did you ever see the original of this paper?

A. Yes.

[fol. 591] Q. And in whose possession was the original?

A. The Revenue Agent of the Internal Revenue Bureau.

Mr. Rosenblatt: I offer this in evidence.

Mr. Winsten: I object to it, if your Honor please, on the ground it is not the best evidence, and on the further ground it is a self-serving declaration and not competent. The defendant is not here to be examined in respect of the information contained in this return.

The Court: Objection sustained.

Mr. Rosenblatt: Mark this for identification again. We cannot get the original.

The Court: But there is no way in which this plaintiff can cross-examine or question Mr. Vanderbilt about it.

Mr. Rosenblatt: He handled all the matters in connection with the Revenue Agent. He has just testified to it.

The Court: That may be so, but there is no way that this plaintiff can cross-examine Mr. Vanderbilt in connection with any of the items contained herein.

Mr. Rosenblatt: For that matter, your Honor, every tax return is a self-serving declaration. The fact that it is filed as it is filed makes it so.

The Court: Even the Government sometimes does not take the contents of an income tax return.

Mr. Rosenblatt: The Government audits it.

The Court: I say, even they don't take it sometimes.

Mr. Rosenblatt: That's very true, your Honor.

[fol. 592] The Court: They don't even take it as being the proper items.

Mr. Rosenblatt: But here is a man who has to do with the audit. He has got all the working papers.

The Court: But I am concerned with the rules of evidence in this case.

Mr. Rosenblatt: The best evidence, your Honor, would be the filed paper itself, but it is impossible to get the filed paper.

Mr. Winsten: The best evidence, your Honor, would be the testimony of the defendant himself in evidence.

The Court: Either that or the defendant himself who would testify and who would be subject to cross-examination.

Mr. Rosenblatt: Would you mark that for identification, please?

(The paper referred to was marked Defendant's Exhibit X for identification.)

Q. Now, I show you a paper writing bearing date 1952, purporting to be United States individual income tax return, and ask you what you know about that paper.

A. This is a return for Mr. Cornelius Vanderbilt, Jr. that I prepared.

Q. Is your name on that paper?

A. Yes, sir, I signed the original return.

Q. You signed the original return?

A. Yes, sir.

Mr. Rosenblatt: I offer it in evidence.

Mr. Winsten: The same objection, if your Honor please.

The Court: Objection sustained.

Mr. Rosenblatt: Would you mark that for identification?

[fol. 593] (Paper marked Defendant's Exhibit Y for identification.)

Mr. Rosenblatt: May it please the Court, if you will adhere to these rulings that you have just made, may I have your permission to notify Colonel Josephs, who prepared the returns for 1950 and 1951, and tell him that he won't be needed here in view of the fact that your Honor will not admit them into evidence, even returns prepared by these respective people?

Mr. Winsten: I don't think Colonel Josephs' testimony will make these tax returns competent in any respect.

The Court: That's what he says. He said in view of my ruling it would not be necessary to call him.

Mr. Winsten: I did not hear that, your Honor, I am sorry.

The Court: I don't know what Colonel Josephs could testify to.

Mr. Rosenblatt: No other questions.

The Court: Let me ask you this question, Mr. Rosenblatt:

(Conference between the Court and counsel, at the bench.)

Patricia W. Vanderbilt resumed the stand and testified further as follows:

Cross-examination.

By Mr. Rosenblatt

(Continued):

Q. Mrs. Vanderbilt, on this list of expenditures made [fol. 594] annually for your clothing, and so forth, when was that list prepared?

A. Well, this particular list I prepared over the past few weeks.

Q. In preparation for this case?
A. I had gone all over it originally.
Q. Did you go over it with your lawyers?
A. That's right.
Q. Tell me, do you recall the item for your gloves?
A. Yes.
Q. How much was it?
A. $1,000 a year.
Q. A thousand dollars a year. How many pairs is that?
A. It is a great number of pairs, that were bought over the four year period.
Q. No. How much in each year is a thousand dollars a year?
A. Well, I have that figured out here for you.
Q. All right; please tell me.
A. This takes in the fall and winter of—let's see—I think approximately 20 black gloves and 8 brown and 6 white, and other different, various colors, about 6 or 8 of those for the fall and the winter; and then in the spring and the summer seasons there were white leathers, and about 6 different black ones, about 10 white leather, and cloth, and about 6 different black ones, and then several other colors, and then you see, in addition to that, there is evening gloves of an extensive nature, long kid and white and black, and other colored things to go with different outfits.
Q. Would you say there would be 100 pairs a year?
A. No, I would say there is much more than that.
Q. Many more than 100 pairs?
A. Yes.
Q. And that would be many more than 400 pairs of gloves during this four year period, is that right?
A. I would say yes, that's right.
Q. Where are they?
A. Well, they wear out and one gets lost.
[fol. 595] Q. How many of these 400 pairs of gloves have you got now?
A. I don't know; I don't know.
Q. Just estimate for the Court?
A. I really could not say, sir, because I have not unpacked completely.

Q. You mean that your possessions are still packed?

A. Well, I am living in one room, Mr. Rosenblatt. I could not unpack all those things.

Q. Where are these possessions?

A. Here.

Q. In storage?

A. I have some in storage and I have some in the basement of the hotel.

Q. Can you tell us what else is contained in these stored boxes or trunks or whatever they may be?

A. Where—here?

Q. Yes.

A. Well, there are some—mostly clothing.

Q. Have you got any things elsewhere in New York?

A. No. I left a few things with my brother, but I cannot even recall what they are, because when I was packing at that time I was very ill, and I let my maid, Miss Masters, do most of it, everything for me.

Q. Madam, on the $750 of hats a year, how many hats would that be, a total?

A. I went over that and recalling almost every hat, and I could not even recall all of them, and they ran me about $30 apiece and on up to $60 apiece for some that I had gotten in Paris, and that does not even include all of them, except that, you see, I never got too many hats at certain times.

Q. Is it a fair statement that whatever hats you have are still in storage, too?

A. No.

Q. How many are in storage?

A. I could not possibly tell you.

Q. Where is this storage warehouse, aside from the base-
[fol. 596] ment of the present premises that you occupy?

A. At—well, it is the Cirker's Storage. It is 40—something, on the East Side.

Q. What allowance do you get at the present time?

Mr. Winsten: That is objected to, if your Honor please. From whom?

The Court: I will allow it.

Mr. Winsten: Is Mr. Rosenblatt inquiring as to what she is receiving from the charitable agency?

Mr. Rosenblatt: That's right.

A. They are giving me about—it comes to over $400 a month.

Q. Over $400 a month?

A. Yes.

Q. Do you have any income or sort of income from any other source?

A. No.

Q. Would you say that these articles of clothing and the shoes and gloves and so forth would constitute any possessions of any value?

A. Well, they do not. I have found out because I have had to sell things from time to time when I could not get any money, and a good coat at the most brings $10 second hand.

Q. And when you went to sell these articles did you sell them in New York or in California?

A. I sold a number of things here in New York in 1953 and in 1954.

Q. And did you sell that jewelry that you talked about getting?

A. Yes.

Q. And how much did you get for that?

A. Oh, I don't know what the overall of it is, but it was very little. On a very good pin, I remember one time, I only got about $30 for a gold pin with a pearl in it.

Q. Is that the whole amount that you received?

[fol. 597] A. No, sir. I cannot remember all the other things, the clothes and all that sort of things.

Q. Well, don't you remember anything about these gowns and dresses and lingerie?

A. What do you mean? I did not sell any gowns.

Q. You still have those?

A. I still have some. I don't have everything that I purchased.

Q. How many do you have?

A. I don't know, Mr. Rosenblatt.

Q. Can you guess?

A. No, I couldn't begin to.

Q. The total amounts which you said yesterday were spent on an annual basis—and I want you to correct me if

I am wrong—amounted to $44,820 per annum is that correct?

A. For what, sir?

Q. Well, there was the $19,000 and these various items that you said you spent on an annual basis.

A. It comes to more than that.

Q. I am taking only the items on an annual basis.

A. I don't understand what you are asking. Are you taking everything that I gave you?

Q. No, I am only taking the ones that you said you spent so much a year on. Do you want to go over them?

A. Well, will you tell me what you are taking? I might be able to——

Q. You said that you spent annually 18 to 19 thousand dollars a year.

A. On what?

Q. For clothes.

A. Yes.

Q. You said that for entertainment annually $1,000 for theatricals, $5,000 for night clubs——

A. Wait a minute, I cannot keep those in my head.

Q. Well, you kept them in your head when you testified to your own counsel yesterday, Madam. Now please take the figures down, will you?

A. I am sorry, sir, I am trying to.

Q. Tell me if I am wrong.

A. Wait a minute, please. Don't get ahead of me.

[fol. 598] Q. I put down $19,000 for your clothing, I put down $1,000 for your theatricals, I put down $5,000 for your night clubs——

A. Wait a minute.

Q. Is that wrong?

A. I cannot keep everything in my head at once, I'm sorry. You see, I have entertainment and gifts listed here as $12,000 a year, and that in the gifts, and the night clubs and the shows and that sort of things. Now, that is about $6,000 for the night clubs and shows and all that sort of thing, and then it is about $6,000 up on gifts.

Q. Isn't it true that all these figures are estimates, Madam?

A. Oh, yes, sir, I said that they are.

Q. And aren't they really guesses?

A. They are, I would say, on the gifts, $6,000 yearly is a very low estimate.

Q. Well, yesterday you said there were $2,000 worth of gifts for public relations people, politicians, and so forth—do you remember that?

A. That's right.

Q. Was that after all the $6,000 that you are now talking about?

A. Yes.

Q. What other gifts are you talking about?

A. I am speaking of all the things that we collected in Europe which is almost impossible for me to figure because you are handling different money, and I am all right when I am handling it there, but now, you see, I get mixed up on that, on the various moneys.

Q. What do you pay a month at your present hotel?

A. I don't even know.

Q. Where you live now?

Mr. Winsten: That is objected to as incompetent, irrelevant and immaterial.

Mr. Rosenblatt: Why?

[fol. 599] Mr. Winsten: What she is saying at this time because she is not being supported by the defendant, she is being supported by a charitable agency, and what a charitable agency provides for her is not relevant, material, or competent to what she should be entitled to from the defendant.

Mr. Rosenblatt: That is a question of law, your Honor, which was briefed before your Honor.

The Court: Let us have it.

Q. How much do you pay a month now?

A. The rent is about—well, it is over $100 a month for one room and no bathroom.

Q. And what is your food a month?

Mr. Winsten: That is also objected to on the same grounds, if your Honor please.

Mr. Rosenblatt: May the witness answer?

The Court: Go ahead.

A. I say I don't know. I have not figured it out.

Q. Well would you take two seconds and figure it out and tell us?

A. It takes me longer than that to figure anything, Mr. Rosenblatt. I would say that the remainder of the money that I get goes for food.

Q. Approximately $300 a month you spend for food?

A. I would say so.

Q. You would say that?

A. That's right.

Q. And how many people does $300 a month feed?

A. Well, that is hard to say because sometimes my daughter is not with me, and there is only the two of us and she is staying with friends at this time, and part of that I get the breakfast there which is very reasonable.

[fol. 600] Mr. Rosenblatt: May it please the Court, I am not interested in having the fact made public, but I want to disclose to your Honor on this record as to the source of this $400 a month.

The Court: How is that relevant? Do you question the fact that this woman is on relief?

Mr. Rosenblatt: I don't question the fact that she is receiving moneys from an agency, but I question the fact of the amount, and I propose to find out.

The Court: I don't see how that is relevant.

Mr. Rosenblatt: Well, your Honor, there have been a lot of statements made before your Honor, and every time there is an apparent conflict between previous and present testimony, or between her testimony and the fact, then I get this long, dramatic surge and it runs away into nothingness. Now, I want to pin it down.

The Court: I know, but the question before me is, number one, whether or not she is entitled to maintenance and support; and number two, to what extent. What she is doing now, and how she is getting her maintenance, and whom she gets it from is not relevant here.

Mr. Rosenblatt: May it please the Court, I have heretofore urged that this woman being lawfully divorced is not entitled to the considerations of a married woman, is not entitled to support, and I briefed that on the same basis

as where this Court gives moneys where a decree of annulment has been granted, and I think for the purposes [fol. 601] of this record I have a right to these facts. So far as I know, this agency is not a public welfare agency in the sense that it is the City of New York—or, maybe it is, I don't know. I want to know about it.

Mr. Winsten: If your Honor pleases, of course I disagree with Mr. Rosenblatt as to the measure of the standards of support, and we have briefed the question too for your Honor. Notwithstanding that, it is not relevant how much any agency is giving to this plaintiff at this time, because that does not measure the defendant's obligation to support, and that agency will cease extending such support very soon. There is no telling how long that agency will continue it.

The Court: I will sustain the objection.

Q. Now, will you tell his Honor what your best guess is as to the total amounts, whether they have anything to do with the figures that you gave us yesterday or the figures you are now giving us, your best guess as to what you spent a year from September 1948 to September 1952?

A. You mean including everything?

Q. That's right.

A. For the whole period?

Q. I want it on an annual basis. How much did you spend?

A. On an annual basis I believe that I can't—I mean, from what I know having spent, I think about $73,000 a year.

Q. And during that period of time did you receive $73,000 a year yourself?

A. What do you mean?

Q. I don't mean anything. I am asking, did you receive $73,000 a year, you, personally and expend it?

A. It was spent.

[fol. 602] Q. Did you spend it?

A. Neil paid the rent——

Mr. Rosenblatt: May I have an answer to my question, your honor? Did she spend it?

The Court: The question is, did you spend the $73,000?

The Witness: Between the two of us we spent it. I spent a great deal and he spent a great deal.

Q. Do you know what he spent?

A. I know what he spent on certain things, yes.

Q. Do you know what he spent per year?

A. Well, part of what I have included here is what we spent jointly.

Q. Do you know generally what he spent per year?

A. Well, I have not even tried to do that, Mr. Rosenblatt.

Q. Tell me what he spent on his travels and lectures and expenses of a business nature.

A. Well, as I said, I cannot estimate what he spent on that in travelling, because he is going around by train and sometimes he rents an automobile, and he is going to and from various parts all over the country, and staying in hotels in between or else sleeping on the train overnight. Now that is an impossible thing for me to do, except that I do know hotel prices for a night for one person run about $10 or $12.

Q. Do you recall your statement on filing a joint return with him for 1951?

A. In the affidavit.

Q. Yes, in your affidavit. Do you remember that?

A. Yes.

Q. Well, tell me, when you filed that return with him in 1951, how much was deducted for his business expenses?

A. I don't know Mr. Rosenblatt.

[fol. 603] Q. Can you give us any idea?

A. No, I cannot.

Q. Was it a small insignificant amount?

A. I cannot tell you, Mr. Rosenblatt.

Q. Was it a substantial amount?

A. I cannot see it before me, so I cannot tell you.

Q. You have no idea?

A. No.

Q. It might have been greater than the amount of the income—is that possible?

Mr. Winsten: That is objected to, if your Honor pleases, what it might have been.

Mr. Rosenblatt: I am searching her memory, not yours, counsel.

The Court: I will allow it.

A. What do you mean—what he spent was greater than the income of the lectures? Is that what you mean?

Q. Yes.

A. I don't know.

Q. You don't know?

A. No.

Q. And these amounts that you say you spent, those amounts came from Mr. Vanderbilt himself and from the generosity of his mother, is that so?

A. Well, they came from—that's right.

Q. Now, do you recall what you received in 1952——

A. There are other sources of money than that.

The Court: What are they?

The Witness: Well, I did the Pond's ad. That's $3,000 that I got.

Q. Let us take the month of September, 1952. You got $600 from Mr. Vanderbilt, didn't you, for this house that you had taken in Beverly Hills?

A. No, that was not for the house. The house was different.

[fol. 604] Q. Did you get $600 from him?

A. Sometime around the first of October, either late September or the first of October, but, you see, I was in the hospital on the 1st of October, so it is late September or early October.

Q. And did the rest of the moneys that you got come from Mrs. Vanderbilt, Sr., his mother?

A. Well, sometime early in September I got only the one check for $833.33.

Q. You were examined in the Domestic Relations Court of the City of New York on May 18, 1953, do you recall?

A. I have been to the Court, yes.

Q. I am reading from that record at page 33:

"Q. So that you received in the month of September, 1952, $1,433.33, the total of the $833.33 sent from his mother's secretary, and $600 from him"—referring to Mr. Vanderbilt—"is that correct? A. Well, that is correct, yes."

Were you asked that question and did you make that answer?

A. Yes, except I can——

Q. Now, let's go back to August 1952——

Mr. Winsten: Just a moment, please. I think the witness should be permitted to finish the statement.

The Court: Is that your answer?

The Witness: Well, sir, there is always a question as to when I got the $600, whether it is late September or early October, if it makes any difference. I don't know if it does.

The Court: How important is this? The fact is you admit [fol. 605] receiving a certain amount a month from Mrs. Vanderbilt, Sr., is that right?

The Witness: Yes, sir.

The Court: Why is the first payment in September important in 1952?

Mr. Rosenblatt: That was the last month before she started her suit here in New York in September 1952. She started a suit here in this Court on October 1, 1952.

Q. Now, I want to go to August 1952, and I want you to tell me what you got that month. Did you get the $833.33 from Mrs. Vanderbilt, Sr.'s secretary?

A. I think so.

Q. And did you get the $200 a month?

A. I think so.

Q. And did you get $600 a month from the defendant?

A. Well, there was no $600 check, no, not that I know, no, no.

Q. You only got the moneys from his mother?

A. Well, there were other moneys.

Q. Well, what?

A. Well, things just were never done on a monthly basis with the exception of what came through Mrs. Van Name's office.

Q. Mrs. Van Name is Mrs. Vanderbilt, Mr. Vanderbilt's mother's financial secretary, is that right?

A. That's right.

Q. Otherwise the amounts that Mr. Vanderbilt gave you were sporadic, is that your testimony?

A. Well, he would give it to me in different ways, in

cash, or we would go to the American Express all over the country and get Traveler's checks.

Q. You were not at the American Express in '52, August of 1952, were you?

A. Oh, yes, I very well was.

Q. Where were you in August 1952, tell his Honor.

[fol. 606] A. The Traveler's checks, different types of—what do you call them—Bank of America Traveler's checks.

Q. He sent you Bank of America Traveler's checks in August of 1952?

A. No, sir. We would go there and he would put large amounts of cash into Traveler's checks.

Q. I want to know what you got in August 1952. Mr. Vanderbilt was in Europe, wasn't he?

A. I cannot recall what I got. I think I got the two checks from Mrs. Van Name. Now I don't know what else I got, I cannot recall.

Q. Do you know what you got in July 1952?

A. I cannot recall all that. There was nothing very regular about anything.

Q. Did you want his Honor to understand that when you asked for $2,655 a month, that that was only a figure which should be built on to?

A. What?

Q. Is that the full amount that you are asking from this Court, the $2,655 a month?

A. I don't know what you mean, sir.

Q How much are you asking his Honor to give you?

A. Well, I have a basic cost here figured at $2,665 a month.

Q. Is there anything additional to that?

A. Well, I have this long needed dental work which is an expensive thing every time I have to do it.

Q. Anything else?

A. Then I have a lot of medical care that I absolutely need, and it is impossible to know when I am going to be put into the hospital, or whether I will have to have the spinal operations, and all that sort of thing.

Q. By the way, Mrs. Vanderbilt, when you gave his Honor the medical figures you gave him for 1950, 1951, 1952 and 1953—do you recall that, yesterday?

A. Yes.

[fol. 607] Q. Well, tell us about 1949. You were in the hospital in 1949, too, weren't you?

A. I was in the hospital, yes, for a couple of days and had several doctors in and out there. Now I made only an estimate of that except on the price there because I did not pay it, as I recall. I think Neil paid it, but there were X-rays taken and I know that Dr. Kennedy alone sent a bill for $150.

Q. What kind of doctor was Dr. Kennedy?

A. I think he is a nerve specialist.

Q. A nerve specialist?

A. That's right.

Q. And the X-rays were taken of what part of your anatomy?

A. All over.

Q. All over?

A. Yes.

Q. Were they taken of your back?

A. I think so.

Q. Spine?

A. I cannot recall all these details, Mr. Rosenblatt.

Q. Well, try hard.

A. Well, I think they were, yes.

Q. And were they taken of your head?

A. No.

Q. Well, are there any other parts of your anatomy they were taken of? Were they taken of your feet?

A. I don't know.

Q. What's that?

A. I don't think so.

Q. Well, don't you know where they were actually taken?

A. They were taken at the hospital.

Q. Yes; and don't you know what part of your anatomy they referred to?

A. I don't know. Sometimes when they had X-rays I don't know what they were trying to shoot, what kind of a picture they were trying to get.

Q. But you had a full series of X-rays at that time?

A. I am not sure.

Q. Are you sure that you had any?

A. Well, yes, I had.

Q. At the Doctor's Hospital?

A. Yes.

[fol. 608] Q. In 1949?

A. Yes, sir.

Q. Now, tell me——

A. You see, that year there were other medical expenses, too, that I know about, like the vaccinations.

Q. Well, that did not take place at the Doctors' Hospital did it?

A. No, that was earlier in the year.

The Court: Excuse me. Did you have a check account of your own that was opened during your married life?

The Witness: I had several, sir.

The Court: You did have check accounts?

The Witness: Yes.

The Court: And you made deposits from time to time in those check accounts?

The Witness: Only in small amounts, sir.

The Court: Who gave you the money?

The Witness: Well, part of what came from Mrs. Van Name's office was put in there.

Q. Tell me, Mrs. Vanderbilt, in this breakdown of the $2,655 a month that you are asking for, how much are you allocating for rent and for what kind of an apartment?

A. Well, rent, I have it at $400.

Q. That is for what type and kind of an apartment?

A. That is the area in which we were talking about yesterday, between 60th and about 85th, or thereabouts, and from Park and Fifth Avenues.

The Court: How many rooms, did you say?

The Witness: Well, sir, a master bedroom, and a guest room and a servant's room.

The Court: What do you need a guest room for?

[fol. 609] The Witness: Well, I have always had guest rooms.

Q. Well, you did not have it in New York, did you?

A. How do you mean?

Q. You did not have a guest room at the only place you ever stayed in New York, 1048 Fifth Avenue, did you?

A. Well, I suppose so, no.

Q. Now tell us what other rooms you want that apartment to contain.

A. Well, I have said—and then two baths, and then the kitchen and living room.

The Court: Bedroom, kitchen, living room, two baths and a guest room—five rooms, is that it?

Q. Is that what you are asking for, five rooms?

A. Two bedrooms, two—I don't know whether they call baths in there or not.

Q. What do they call them in California?

A. What do you mean?

Q. Is there a difference between apartments in New York and apartments in California as to description?

A. I don't think so.

Q. Well, you occupied an apartment in California with Mr. Vanderbilt, didn't you, at the Sunset Towers?

A. No.

Q. You never occupied any space in the Sunset Towers, an apartment house in Los Angeles or Beverly Hills, or whatever it is, or Hollywood?

A. But that was not an apartment particularly. That is the Sunset Towers Hotel, and I was there for several months, but Neil was not in the same apartment.

Q. And what accommodations did you have there?

[fol. 610] A. I had a kitchen and a dining room and living room, bathroom and half—what they call a half a bath, and a large dressing room, and then a large bedroom.

Q. Did you have a maid's room?

A. No, there is maid's service.

Q. Did you have a maid?

A. I had a cook coming in, yes.

Q. You don't cook yourself?

A. Not very often.

Q. Well, did you ever cook during your first marriage?

A. Yes.

Q. What type of accommodation was provided for Mrs. Vanderbilt when he joined you at the Sunset Towers apartment?

A. Well, he had pretty much the same thing. He had a——

Q. Was he in your apartment that you were occupying?

A. No.

Q. He had to take other quarters, didn't he?

A. Yes.

Q. Now, let us get back to this one. Is this an apartment that you are asking his Honor for that you require or that you wish, which is it?

Mr. Winsten: That is objected to, if your Honor pleases. I don't think the witness—I don't understand the question.

Mr. Rosenblatt: Maybe she requires it to store all of these garments and goods and gloves and shoes and hats—I don't know.

Q. Is this one that you require, Madam?

A. Yes, sir.

Q. You could not live on less than the amount that you are asking for, for this apartment?

Mr. Winsten: Objected to, if your Honor please.

The Court: I will allow it.

A. Well; I have gone into this——

[fol. 611] Q. No, no, just stick to the question. This is what you require, is that right?

A. Yes.

Q. And you cannot live on anything less than this, can you?

Mr. Winsten: That is objected to, if your Honor pleases.

The Court: I will allow it.

Mr. Winsten: Of course everybody can live on less than that. The question is the standard that this defendant is required to support this plaintiff.

Mr. Rosenblatt: Applesauce, your Honor.

The Court: I will allow it.

Mr. Winsten: And I object to counsel's characterization of any objection that I make, and I move it be stricken.

The Court: Strike it out.

Mr. Rosenblatt: Read the question back to her and let her answer it, please.

Mr. Winsten: We are not a barroom here.

The Stenographer: "And you cannot live on anything less than this, can you?"

The Witness: Well, I don't know how to answer you, Mr. Rosenblatt. I mean—I know that I need so many rooms in an apartment.

Q. And that is for yourself?
A. That's right.
Q. And for yourself alone?
A. That's right.
Q. And you need according to your statement, a six-room apartment for yourself alone?
A. I very definitely in an apartment have to have someone with me at all times, and I am talking about a maid or a general woman. I get these terrible fainting spells and I pass out.
[fol. 612] Q. Now perhaps—well, let me withdraw that. When you say you need a six-room apartment for yourself to contain a maid living with you, are you sure that you and the maid could not live in less than a six-room apartment?
A. I would say not comfortably, because certainly I would like to have friends in. I need to see people.
Q. You have put an item in here, or I believe you are about to testify that your food requirement would be $450 a month, is that right?
A. Yes, sir.
Q Well, tell us, do you eat more food in a six-room apartment than you eat now?

Mr. Winsten: That is objected to, if your Honor pleases. The question incorporates a non-sequitur.
The Court: There is not testimony what she is eating now.
Mr. Rosenblatt: Yes, she says she spends $300 a month for food right now out of the $400. That's what she testified to, sir.
Mr. Winsten: The question includes an improper conclusion. The plaintiff can eat now only what she can afford on the amount she has.
The Court: I will let her answer it.
Mr. Rosenblatt: Read the question back.
The Stenographer: "Q. Well, tell us, do you eat more food in a six-room apartment than you eat now?"
The Witness: Well, yes. That would include the maid's food.

Q. Is that all?
A. And I need a great deal of food, and I am supposed to be on a high protein diet which is very expensive.
[fol. 613] Q. And tell us, is the amount of $500 you seek

a month for clothing the minimum amount with which you could do?

A. At this time, because so many of the things had to be thrown away and had been discarded previously, and then I have sewed a great deal. I have not very many things now that I can wear.

Q. You could not live on less than $6,000 a year for clothing, is that your testimony?

Mr. Winsten: I object to the form of the question, if your Honor pleases. That is not her testimony.

Mr. Rosenblatt: That is cross-examination.

The Court: I will allow it.

Q. Tell us.

A. Well, I don't see how, the condition that my clothes are in. After all, I have lost 30 pounds. I can hardly wear anything.

Q. I am asking whether you can get along on less than $6,000 a year for clothing?

A. No.

Q. You could not?

A. No.

Q. And you could not get along on less than $400 a month for traveling and vacations, including one trip abroad for one month, is that right?

Mr. Winsten: I object to the form of the question again, if your Honor please, as to what she cannot get along on. Your Honor well knows the standards that the Court will adopt, are not what she could get along on.

The Court: Reframe your question so that we don't have any objection to it. Reframe it.

[fol. 614] Q. What amount do you ask for traveling and vacations per month?

A. A month?

Q. Yes, a month.

A. I don't know how to figure it, sir, because I have it—I guess it comes to about $400 a month I think. I would not spend it that way, I suppose, I don't know.

The Court: Why do you need $400 a month for traveling? Where do you expect to go?

The Witness: Well, I would like to go to Europe, various places in the world.

The Court: What's that?

The Witness: I would like to go to Europe, and I would like to go to Honolulu, and I would like to go to several different places.

The Court: How often do you want to go there?

The Witness: Well, one vacation a year.

Q. How many times did you ever go to Europe before you met Mr. Vanderbilt?

Mr. Winsten: That is objected to, if your Honor pleases, as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Q. Well, actually during the time you were living with Mr. Vanderbilt you did not go to Europe every year, did you?

A. No, we did not go to Europe, but we went to other places all over the United States.

Q. And you propose to do that likewise?

A. What do you mean?

Q. You propose to travel all over the United States each year?

[fol. 615] A. I do not propose to do it in the manner in which he was doing it, of perpetually doing it, no. I would do it within a month or two months' time.

Q. This amount of $400 a month is an estimate also, isn't it?

A. Well, yes, it has been figured out as to what it would cost me.

Q. Well, actually you had previously figured out much higher figures than this $2,655 a month, hadn't you?

A. What do you mean?

Q. Didn't you ask this Court for $1,500 a week?

A. I had previously, yes.

Q. And you figured out the requirements that you said you were under in order to get that figure of $1,500 a week?

A. This has been cut way, way down, according to the expenses that I know about, and this does not include a lot of things.

Q. And can you tell me please, whether or not you could

live comfortably in a reputable and respectable part of the great city of Greater New York and enjoy a comfortable apartment for less than $2,655 a month?

Mr. Winsten: I object to the form of the question, if your Honor pleases, as to what she could live comfortably on. That is not the issue or the standard in this case.

Mr. Rosenblatt: She has considered all these things in getting up all these figures.

The Court: I will allow it.

Mr. Winsten: Exception.

Mr. Rosenblatt: Will you read the question back to her, please?

The Court: You heard the question. Can you answer it?

The Witness: What is it? Could I live comfortably elsewhere—is that the idea?

[fol. 616] The Court: Could you live on less than $2,600 a month?

The Witness: No, sir, not with—this is cut way down from what I originally, and it does not include a lot of things. I mean this is area that I know the people that I know live in, and it is a convenient area for everything that I have and everything that I plan to do.

Q. Do you plan to entertain your brothers as guests of yours in New York.

Mr. Winsten: That is objected to as incompetent, irrelevant and immaterial, if your Honor pleases.

The Court: Does she have an item of entertainment?

Mr. Rosenblatt: Yes, she does.

A. Do I plan to entertain them?

Q. Yes.

A. Well, sir, I don't think they are ever in New York. They may be in the future, I don't know.

Q. Did you have in mind any particular guests who would occupy this guest room that you are asking for?

A. I might have, yes.

Q. Are they from New York City?

A. Maybe from New York, maybe from anywhere. People who live in New York would not need to come and be my guests.

Q. That's right; so I am asking whether your guests would come from other parts of the country or abroad?

A. I would say so, yes.

Q. Well, tell us who would come from abroad?

A. Well, I have not even thought about such things.

[fol. 617] Q. Can you tell us who would come from California?

A. Well, it might be any number of people, I suppose.

Q. People that you had known over a period of many years?

A. Well, yes.

Q. People that you had known in some of the places that you yourself lived in California?

A. California and Honolulu. I was completely raised in Honolulu. I knew lots of people there.

Q. And anybody from any of the places where you were living as a guest of California at any time?

Mr. Winsten: That is objected to, if your Honor pleases. We have been through that.

The Court: Off the record, counselor——

(Colloquy between the Court and counsel off the record.)

Q. How much of this $2,655 a month do you propose to spend on liquor?

A. Well, I don't use too much——

Q. No, just answer the question, please?

A. I have no way of recalling that.

Q. Is some part of the item of food inclusive of liquor?

A. No.

Q. Where is the liquor item?

A. There is no particular liquor item. I don't drink very much myself, and I would probably have a small supply kept around.

Q. And what you want the Court to understand by your request for $2,655 a month is that if the Court were to grant you that amount, and you needed additional amounts over and above that, you would want the Court to regard those amounts over and above the $2,655, is that right?

A. Well, I have the medical and dental care here figured at the minimum. You see all what I am required to have now.

[fol. 618] Mr. Rosenblatt: May it please your Honor, I think that is a simple question to answer.

The Court: She has answered it already. Next question.

Q. You said that these figures do not include anything with respect to the maintenance and support of your daughter, Nanette, do you recall that?

A. Yes.

Q. Is that true?

A. That's true.

Q. Now how do you propose to support your daughter Nanette?

Mr. Winsten: That is objected to, if your Honor please.

The Court: Objection sustained.

Q. Where do the funds come from to take care of Nanette?

Mr. Winsten: That is objected to, if the Court pleases.

The Court: Objection sustained.

Q. Do you receive any moneys for your support or for the support of Nanette given to you from your former husband, Earl K. Wallace of Colorado?

Mr. Winsten: Objected to.

The Court: I will limit it if she receives any money from her former husband so far as she is concerned.

The Witness: Do I receive any? No, sir.

Q. Do you receive any moneys which you use to expend for Nanette?

[fol. 619] Mr. Winsten: That is objected to, if your Honor pleases.

Mr. Rosenblatt: I have a right to test this lady's credibility, your Honor.

Mr. Winsten: That has nothing to do with her credibility.

The Court: Objection sustained.

Q. Would Nanette live in this apartment?

Mr. Winsten: That is objected to, if your Honor pleases.

The Court: I will allow that.

Mr. Winsten: Exception.

A. She would sleep in bed with me, yes.

Q. And would she eat the food at the apartment?

A. Well, yes she would.

Q. And would she be waited on by the maid?

A. Well, I don't suppose there would be any particular waiting on her.

Q. The maid would be available for her services as well, wouldn't she?

A. Well, no. I take care of Nanette myself.

Q. And do any of these items of entertainment or clothing, traveling and vacations, include any allowance for your daughter Nanette?

Mr. Winsten: That is objected to, if your Honor pleases, as having already been testified to once.

Mr. Rosenblatt: I never asked about these items.

The Court: I will allow it.

A. No, I figured those on myself.

Mr. Rosenblatt: Very good, that's all.

[fol. 620] Redirect examination.

By Mr. Winsten:

Q. Mrs. Vanderbilt, his Honor asked you yesterday if you had any information concerning the number of lectures that the defendant customarily gave during the course of his lecture career and during the period that you resided together. Before coming to court here this morning were you able to ascertain any more definite information on that subject than you had received?

A. Yes. I hadn't it in my mind so I was a little mixed up in my mind yesterday. However, since then I recall a lot of conversations, long distant calls with Neil, and also I looked up some data where he says that, and as I recall, it was about 220 a season.

The Court: 220 lectures a season?

The Witness: Yes, and a million and a quarter people, and I remember now hearing him say this from the lecture

platform at one lecture that I went to and it actually runs over more of a period than I gave you yesterday.

Q. This particular figure what you said about 220 lectures per season, did the defendant tell that to you in any way?

A. Well, I heard him say, now that I recall, from the platform in the lecture itself, he would say 200, sometimes 300, and then he would say I don't know how many hundred thousand people or well over a million people.

Mr. Winsten: That's all.

The Court: All right, you may step down.

Mr. Rosenblatt: I would like to recall Mr. Bonderow, sir.

[fol. 621] Jack C. Bonderow, recalled on behalf of the defendant:

Direct Examination resumed.

By Mr. Rosenblatt:

Q. You recall in connection with the defendant's exhibit X for identification, referring to a return for the year 1949, that you testified that you conferred with some internal revenue agent of the United States Government?

A. Yes, sir.

Q. I show you a paper writing dated March 2, 1953, addressed by the United States Treasury Department, Office of Director of Internal Revenue, Upper Manhattan, to Cornelius Vanderbilt Jr. and Patricia Wallace Vanderbilt, c/o Jack C. Bonderow, 295 Madison Avenue, New York 17, New York, and ask whether this is the original received by you following a conference with the agent that you have testified to?

A. Yes, this is the original I received.

Mr. Rosenblatt: May I offer this report and additional taxation imposed by the United States Government after audit of the 1949 return?

Mr. Winsten: May I see everything that you are offering?

Mr. Rosenblatt: I am going to offer the return and audit.

The Court: We will take a five minutes recess at this point.

(At this point there was a short recess.)

JACK C. BONDEROW, resumed:

Mr. Winsten: I object to the introduction of these papers.
[fol. 622] The Court: I have not seen anything yet.

Mr. Rosenblatt: Would you mark this first as Defendant's Exhibit X-1 for identification, and then I will hand it up to the Court.

(Paper marked Defendant's Exhibit X-1 for identification.)

Mr. Winsten: Now I object to the introduction of all these papers on the ground that it is incompetent, irrelevant and immaterial, self-serving, and not binding upon the plaintiff, and upon the further ground that the defendant is not here to be examined with respect to the information contained therein.

Mr. Rosenblatt: This is a Government audit of the return, your Honor.

The Court: I know, but the Civil Practice Act provides how some of these Government records can get into evidence, Section 400, I think it is of the Civil Practice Act.

Mr. Rosenblatt: This is not kept by the Government, your Honor. This is mailed to the taxpayer, and the taxpayer's agent is Mr. Bonderow and his name is shown there on the face of it.

The Court: Objection sustained.

Mr. Rosenblatt: You can step down. Now for the purpose, your Honor, of saving the time of the Court, Colonel N. Henry Josephs, of 90 Broad Street, is in Court and if called would testify that the returns for 1950 and 1951 of Cornelius and Patricia Wallace Vanderbilt were prepared by him and under his supervision.

[fol. 623] I take it that your Honor would adhere to your ruling and refuse to permit these?

The Court: Yes.

Mr. Rosenblatt: And I ask that they be respectively marked for identification.

The Court: Off the record——

(Colloquy between the Court and counsel, off the record.)

Mr. Rosenblatt: I withdraw those previous remarks.

N. Henry Josephs, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

(The witness states he resides at No. 5 East Ninth Street, Manhattan, New York City.)

Direct Examination.

By Mr. Rosenblatt:

Q. Colonel Josephs, are you an attorney at law?
A. Yes, sir.
Q. Duly admitted to practice in the State of New York?
A. Yes, sir.
Q. Since when?
A. Since 1931.
Q. And as such attorney, did you prepare Federal income tax returns for Cornelius and Patricia Wallace Vanderbilt for the calendar years 1950 and 1951?
A. I have prepared. I would like to see the copies.
Q. In the course of the preparation of those returns; did you receive information from Cornelius Vanderbilt Jr. and Patricia Wallace Vanderbilt?
A. As to expenses, yes, sir.
[fol. 624] Q. And as to income?
A. From the two banks and the two lecture bureaus.
Q. I show you a paper writing purporting to be a return for 1950, at the top thereof, United States Individual Income Tax Return, Cornelius Vanderbilt Jr. and Patricia Wallace Vanderbilt, c/o N. Henry Josephs, 90 Broad Street, New York 4, New York, and ask you whether you prepared this return from information given to you by both taxpayers?
A. I have, sir.

Mr. Rosenblatt: I offer it in evidence.

Mr. Winsten: That is objected to, if your Honor pleases, on the grounds, it is incompetent, irrelevant and immaterial and self-serving.

The Court: He says he got the information from both taxpayers. Didn't you hear it?

Mr. Winsten: If your Honor please, the taxpayers, the defendant, is not here to testify.

The Court: I say that he says that he got it from both taxpayers, and one of them, I assume, is your client.

The Witness: As to expenses, if your Honor please.

The Court: You had better inquire then? Do you want me to inquire for you? You should listen to the question, counselor.

By Mr. Winsten:

Q. Mr. Josephs, whom did you get information with respect to the defendant's business expenses from?

A. From the defendant himself, no other.

Q. You did not get that from the plaintiff, did you?

A. No, sir.

[fol. 625] Q. Did you have any opportunity of verifying any of the information that the defendant gave you?

A. As to the expenses, I had to accept my client's statements.

Q. Did you verify any of the information that the defendant gave?

The Court: I am concerned with your client's participation in filing this income tax, if it is her information. Now, off the record——

(Colloquy between the Court and counsel, off the record.)

Q. Did the plaintiff give you any information with respect to this information with respect to what is contained in this document?

A. Not herself, sir.

Mr. Winsten: I object to it, if your Honor pleases.

The Court: Objection sustained.

By Mr. Rosenblatt:

Q. Do you know whether or not the plaintiff, Patricia Wallace Vanderbilt signed this return?

A. It had to be signed because it was a joint return, sir.

Q. Did you send or deliver to her this return for the purpose of being signed by her?

A. They have been sent and delivered to Mr. Vanderbilt for signature by both parties.

Q. Do you know whether both parties signed the original return?

A. I assume they have, otherwise they could not be filed.

[fol. 626] Mr. Winsten: Just a moment, if your Honor pleases. I move to strike that out as unresponsive.

The Court: The question is, do you know whether it was signed personally?

The Witness: Of my own knowledge—I was not there and did not witness the signatures, but I received them.

Mr. Rosenblatt: I better have this marked for identification. I'm going to make some inquiry about it. This is the 1950 return.

(Paper marked Defendant's Exhibit Z for identification.)

Q. I call your attention, Colonel Josephs, to an item of income, schedule G on this paper, Defendant's Exhibit Z for identification, relating to an amount of $3,000.

Mr. Winsten: I object to counsel reading from a statement which has been excluded from evidence.

The Court: Objection sustained. The document is not in evidence.

Q. In the report of income received, Colonel Josephs, do you know whether there is reported, was reported to you as income received during the year 1950 by Mrs. Vanderbilt——

Mr. Winsten: That is objected to, your Honor as relating to a document which has been excluded from evidence.

The Court: Objection overruled.

A. Yes, there is an item of $3,000 received by her from Pond's for a publicity release in her name.

[fol. 627] Q. And tell me, looking at Defendant's Exhibit Z for identification, whether that item of Mrs. Vanderbilt's income is referred to in this paper?

Mr. Winsten: That is objected to on the ground that it refers to a document excluded from evidence.

The Court: Objection sustained.

Mr. Rosenblatt: I ask that this return for 1951 be marked for identification.

The Court: This item that you say reported $3,000 income from Pond's, was that information given to you by Mrs. Vanderbilt or given to you by Mr. Vanderbilt?

The Witness: It came through Mr. Vanderbilt.

(Paper marked Defendant's Exhibit AA for identification.)

The Court: So that, it is correct to say that all the information that you say that you included in the income tax return was information that you obtained from Mr. Vanderbilt?

The Witness: Mr. Vanderbilt was my client and through him I prepared the returns.

Q. I show you a paper entitled Individual Income Tax Return, 1951, marked Defendant's Exhibit AA for identification, and ask you whether this paper was sent by you for signature of Mrs. Patricia Wallace Vanderbilt?

A. It was not sent to me by Mrs. Vanderbilt.

Q. No; I asked you whether you sent it for signature by Mrs. Vanderbilt?

Mr. Winsten: I object to the question, if your Honor [fol. 628] pleases, because it incorporates a conclusion and a state of fact not in evidence.

The Court: Objection sustained to the form of the question.

Q. After this paper was prepared, you have testified, what was done with it?

A. The tax return was prepared by my office and mailed to Mr. Vanderbilt, in California, for signature by both parties and it was a joint return.

Mr. Rosenblatt: That's all, and I have an exception to your Honor's ruling.

Mr. Winsten: That's all.

Mr. Rosenblatt: Now I ask for the production of the United States Income Tax returns filed by Cornelius and Patricia Wallace Vanderbilt for the year 1951, as sworn to in the affidavit of Mrs. Vanderbilt which she filed a joint return for the year 1951 with Mr. Vanderbilt.

Mr. Winston: There has been no notice to produce

served on me to furnish a foundation for this income tax return in the first place; and in the second place, we don't have it.

Mr. Rosenblatt: I would like Mrs. Vanderbilt to take the stand again.

Mr. Winsten: I object to Mrs. Vanderbilt being recalled, your Honor. I think this is entirely out of order.

Mr. Rosenblatt: In view of the testimony of the last two witnesses——

The Court: Just a minute, we are a little ahead of ourselves. Does the plaintiff rest?

Mr. Winsten: The plaintiff rests.

[fol. 629] Mr. Rosenblatt: Oh. Now, may I have Mrs. Vanderbilt recalled to the stand?

The Court: As your witness?

Mr. Rosenblatt: Well she is never binding on me.

The Court: I mean you are calling her?

Mr. Rosenblatt: Yes, I call her.

The Court: As I understood, Colonel Josephs and the other witness were put on the stand out of regular turn.

Mr. Rosenblatt: That's right, your Honor. Your Honor is perfectly right.

PATRICIA WALLACE VANDERBILT, recalled:

Cross-examination resumed.

By Mr. Rosenblatt:

Q. Mrs. Vanderbilt, did you receive in the year 1950, the sum of $3,000 paid by the J. Walter Thompson Company, of New York, for an endorsement of Pond's Cold Cream?

The Court: She testified to that. She said yes.

A. I said I did, three or four different ads at about $3,000 apiece over that time and I have said they were in one year.

Q. And was that true for 1950?

A. I think so, I'm not sure.

Q. Did you furnish the information as to the receipt of that $3,000 to Colonel Josephs?

A. No.

Q. Did you tell anybody about it?

A. Well my husband knew about it.

[fol. 630] Q. Did you tell him to tell anybody about it?

A. No.

Q. Did you sign a joint tax return with your husband for the year 1950?

A. I'm not sure. I have signed returns with him.

Q. Didn't you sign a joint tax return with him each year after you were married?

A. I am not sure of that either.

Q. I show you Defendant's Exhibit Z for identification, and I call your attention to the item of $3,000 as income given from the J. Walter Thompson Company of New York, and ask whether if you signed a joint return with your husband for the year 1950 that information was contained therein?

Mr. Winsten: That is objected to, if your Honor please.

The Court: The objection to the form of the question is sustained.

Q. Did you report and pay any tax alone or with your husband on the amount of $3,000 received by you for an endorsement from Pond's Cold Cream in 1950?

A. I don't know.

Q. Did you receive and pay a tax on an amount of $3,000 received by you in the year 1951?

A. I don't know either about that year.

Q. You said to this Court on June 24, 1954, that you filed a joint tax return with your husband, where did you get that information?

A. Well, at the time, I don't know, except there had been other proceedings, and it must come out of other papers or somehow, I cannot tell you.

Mr. Rosenblatt: I move to strike that out as unresponsive.

The Court: Strike it out.

[fol. 631] Q. I want to know when you swore last June, 1954, that you filed a joint income tax return with your

husband for the year 1951, where did you get that information?

A. Well, sir, I supplied different lawyers that I had with all sort of data, and memory, and everything else, and they drew up the different papers.

Q. Was that statement true?

A. Well, yes.

Q. Did you show them the return that you filed for 1951?

A. I did not have any return that I know of.

Q. Do you recall being examined in the course of your first suit against the defendant before Referee Lazar? Do you recall that?

A. That was about residence.

Q. I asked whether you recall being examined?

A. Yes.

Q. And do you recall being shown the tax return filed jointly by yourself and your husband for the years 1949, 1950, and 1951?

A. No.

Q. You don't recall that?

A. No.

Q. And you don't recall whether you saw the returns at that time?

A. Well, sir, what you are calling returns and what was there that you put in were not returns at all.

Mr. Rosenblatt: I move to strike that out, your Honor.

The Court: Strike it out.

Mr. Winsten: I submit that's an answer, if your Honor pleases.

Mr. Rosenblatt: This is part of the drama school in an answer.

Mr. Winsten: I object to counsel's nasty remarks.

The Court: Strike it out.

[fol. 632] Mr. Winsten: And I move to strike it out, if your Honor pleases.

The Court: Strike it out.

Q. Where is the copy of the 1951 return that you filed jointly?

A. Well, I suppose it is with the Department of Internal Revenue.

Q. Have you got a copy of it?

A. No.

Q. Did you have a copy last June?

A. I don't know. I told you that in September, or somewhere I turned over a lot of things, letters, data, notes, and so forth, to lawyers.

Q. Well, you have not had any different lawyer in this case since June, 1954, have you?

A. No.

Q. Was it turned over to Mr. Winsten?

A. I cannot tell you. I cannot tell you because I never got them back.

Q. When was the last time you saw the return or a copy of the return that you filed jointly in 1951?

A. Well, it would be in 1951 that I saw the return.

Q. Did you sign it?

A. I am trying to remember whether I signed every year, or what happened. The income tax gets me into a fog. I cannot figure it out.

Q. But you do recall signing tax returns, don't you?

A. I have signed tax returns. How many, I cannot tell you.

Q. And where were you in March 1952?

A. In March 1952, I was in California.

Q. Do you recall receiving from the office of Colonel Josephs an income tax return for the year 1951 which you signed?

A. Mr. Josephs never sent me the tax return.

Q. Did your husband give you a tax return and ask you to sign it?

[fol. 633] A. Well, he has asked me to sign them. Whether there was one in 1952 or not, I cannot recall.

Q. For 1952; I am referring to the tax return for the year 1951 signed in or about March of 1952.

A. You see, I am all mixed up again.

Q. You are all mixed up?

A. Now you say for 1952—that's right, you're right, it would be the return for 1951.

Mr. Rosenblatt: That's all.

Mr. Winsten: No questions.

WYATT L. HARMON, recalled, in behalf of the defendant:

Mr. Rosenblatt: May it please the Court, before commencing with this witness, I should like the record to note and ask your Honor to take judicial notice of the record which is on file in this Court, the same being the testimony taken before Referee Lazar, where the income tax returns, copies, for 1949, 1950 and 1951 were produced under notice to produce served by the attorney for this plaintiff, and were thereupon offered in evidence and received in evidence before Referee Lazar by this plaintiff, and that these are the copies produced in this Court heretofore marked as an exhibit before Referee Lazar.

Mr. Winsten: And would you please call the Court's attention ——

Mr. Rosenblatt: Pardon me, as Defendant's Exhibit EEE.

The Court: Are those the copies that you have been offering?

[fol. 634] Mr. Rosenblatt: That's right, Defendant's Exhibit EEE. Now, I don't want to interrupt the course of this trial, so I am going to ask your Honor's leave, since I have now made this notation in the record, to refer in the brief which I will file with your Honor—I hope with your Honor's permission—with reference to the admissibility of these returns.

The Court: I think I have already ruled on this very question earlier in the trial.

Mr. Rosenblatt: I merely want to refer to it because the record is on file in this Court.

Mr. Winsten: Now, for the purposes of the record, and in order to complete the record, I would like the record to show that those papers were introduced in evidence upon that hearing before Referee Lazar for the limited purpose only on the issue of domicile, and also for the limited purpose to indicate the residence of the defendant indicated therein, and I now quote Mr. Rosenblatt on that record before Referee Lazar to that extent:

"Mr. Rosenblatt: I do not propose to have the whole thing because I have not looked through what these contain.

I am only interested in evidence of residence. I am not interested in the contents of the income tax returns."

I would like the record to show that.

Mr. Rosenblatt: Of course, I can keep on reading, and I will do that in my brief.

The Court: I have already ruled on the very same question earlier in this trial, and the same ruling applies here.

[fol. 635] Examination.

By Mr. Rosenblatt:

Q. Mr. Harmon, do you recall testifying that you visited the plaintiff and the defendant in Sunset Towers in California?

A. I did.

Q. When they were living together?

A. I did.

Q. Did you see any servants in evidence at the Sunset Towers apartment?

A. No.

Mr. Winsten: Well, the witness testified that there were no servants, if your Honor please, on cross-examination, at the Sunset Towers.

The Court: My recollection is that they had maid service in the hotel.

Mr. Winsten: That's right, your Honor.

Q. Did you ever visit at the home of the plaintiff and the defendant?

A. Yes.

Q. And did you see any servants there?

A. Yes.

Q. How many?

A. One.

Q. And were you served any drinks at their home?

A. Yes.

Q. And by whom?

A. Well, you are speaking sir, of the Sunset Towers which was a home——

Q. No, I am talking about a house rather than an apartment.

A. Pardon me. Yes, I was served drinks at a house.

Q. By whom?

A. By Dave, her brother.

Q. The plaintiff's brother?

A. That's right.

Q. Now, you also testified that you are a secretary of two corporations, Nevada corporations, having to do with the business of the defendant?

A. That's right.

Q. Tell me what the purpose of having those two corporations has been?

[fol. 636] Mr. Winsten: That is objected to, if your Honor please.

Q. What do they do, these corporations?

The Court: Go ahead.

Q. What is their business?

A. To handle the business and revenue of Cornelius Vanderbilt if and when there is any.

Q. Does either of these companies have anything to do with the lectures?

A. Yes.

Q. Can you tell me how many lectures the defendant has given in the past year?

Mr. Winsten: Now, if your Honor pleases, I object to the testimony, or to the question, on the ground that anything that this witness would testify to is necessarily hearsay. He has no personal knowledge of those facts.

Mr. Rosenblatt: He keeps the records, he gets the money.

The Court: Of your own personal knowledge, do you know how many lectures?

The Witness: The corporation was not concerned with lectures prior to about June of 1954, at which time we were incorporated in the State of Nevada. Since incorporation we have a record of only two lectures.

Mr. Winsten: I object to that and move to strike it out on the ground it is not the best evidence, if your Honor pleases. If he wants to produce records——

The Court: He says in 1954. Before that he knows nothing about any lectures, and the only testimony we have in [fol. 637] the record is the plaintiff's testimony that while

she was married to him he lectured to the extent of 220 lectures a year. He is not contradicting her.

Mr. Winsten: No, but he is also giving affirmative testimony to what his present income is.

The Court: Since 1954.

Mr. Winsten: And I move to strike his answer on the ground that if the corporate records show anything, they should have been produced here and properly identified with a proper witness under the shop-book rule under the Civil Practice Act.

The Court: Do I understand that you know this of your own personal knowledge, that he conducted two lectures?

The Witness: That is true, sir.

Q. And do you know how many lectures are scheduled by the defendant at the present time?

Mr. Winsten: That is objected to on the ground it calls for a hearsay answer.

Mr. Rosenblatt: If he knows personally.

The Court: I will allow it.

A. I have a record of four.

Q. You are familiar, you testified, with the premises at No. 2305 Arlington Avenue, Reno, Nevada?

A. Yes.

Q. Have you visited the defendant at those primeses?

A. Yes.

Q. Did you have any part in the negotiations for a renewal of a lease in or about the month of April, 1954? [fol. 638] Mr. Winsten: That is objected to, if your Honor pleases.

The Court: We already have that testimony. Isn't that the one in Reno?

The Witness: Yes.

The Court: He already testified that he had a house out there—is that correct?

The Witness: Yes.

Mr. Rosenblatt: That question, your Honor, was asked about the original lease. Now I am asking about the renewal of the original lease.

Mr. Winsten: Is counsel re-opening the question of domicile now?

The Court: How would that be relevant here?

Mr. Rosenblatt: I want to show what he pays for rent, Mr. Vanderbilt, what he pays for rent.

The Court: How would that be relevant?

Mr. Rosenblatt: Well, I think, Judge, that that is some indication of the standard that you are looking for, as to what is appropriate. If he knows, he can testify as to what Mr. Vanderbilt paid for rent.

Mr. Winsten: I don't think that is material or competent, if your Honor please.

The Court: All right; go ahead, ask him.

Mr. Winsten: Exception.

A. Shall I answer?

Q. Yes.

A. Yes, I did have something to do with renewal of the lease.

The Court: Another thing: how can we compare rental values in Reno with rental values of apartments in New York City?

[fol. 639] Mr. Rosenblatt: Do you want me to take the stand that I do not pay $400 a month, and I have not got a six room apartment and with more people than this plaintiff in it?

The Court: That is not necessary. I mean, I can tell you that I have eight rooms and I pay less than $400, but that is no evidence here.

Mr. Rosenblatt: Your Honor, I certainly think it is material as to what the defendant himself pays for rent.

The Court: The only statement I made—and that did not call for this argument—was, what difference does it make what this man pays rent in Reno, Nevada, in connection with trying to ascertain whether she should pay $400 a month in New York. It is not the same thing.

Mr. Rosenblatt: Nevertheless, I think it is very important.

The Court: Go ahead; ask him the question.

Mr. Winsten: I object to it, if your Honor please, on the ground it is incompetent, irrelevant, and immaterial.

The Court: Go ahead.
The Witness: I don't know the question.
The Court: Do you know how much rent he paid?
The Witness: Yes.
The Court: In 1954.

Q. Do you know?
A. In April, 1954, $250 a month.

Mr. Rosenblatt: That is all.

[fol. 640] Cross-examination.

By Mr. Winsten:

Q. How often had you ever visited the plaintiff?
A. Three times—twice.
Q. Now, the occasions you testified to on direct examination was once at the Sunset Towers and once at some other place, is that correct?
A. That is right.
Q. Where was the other place?
A. In back of the Beverly Hills Hotel. At the moment I cannot think of the name of the street.
Q. And when was it?
A. That was in October of 1952.
Q. That was after the defendant had left the plaintiff, is that correct?

Mr. Rosenblatt: I object to that, your Honor. It is after they ceased living together.
The Court: The objection to the form of the question is sustained.
Q. That was after the plaintiff and the defendant ceased living together, was it not?
A. Now I cannot say as to that, Mr. Winsten.
Q. All right. Now, Mr. Harmon, how long did you stay there when you visited the plaintiff?
A. About two hours.
Q. Did you make any inquiries of the plaintiff as to how many servants she had?
A. No, I did not.

Q. Then all you know is what you saw there during the two hours; is that correct?

A. That's what I testified to.

Q. And you only saw one servant, is that correct?

A. That's right.

[fol. 641] Q. Now, Mr. Harmon, do you know anything about the defendant's lecture business before 1954?

A. Not in an official capacity, no.

Q. Well, in an unofficial capacity.

A. As a friend, yes, I was rather familiar with it.

Q. Do you know what his activities were in about 1952, let us say, with respect to lecturing?

A. You mean numbers or income?

Q. Numbers.

A. No, I cannot give you an answer to that.

Q. Well, if I would suggest to you that the defendant said that he gave 213 lectures during the season of 1952, would you be prepared to dispute that number?

Mr. Rosenblatt: Well, if your Honor please, that is an assumption upon an assumption. If he tells him that the plaintiff told somebody so-and-so, would he be prepared to dispute it?

The Court: Objection sustained.

Q. All right, Mr. Harmon, I show you a paper, and I direct your attention to the last page. Do you recognize the signature there?

—. Yes, I do.

Q. Is that the defendant's signature?

A. It appears to be.

Q. Now I direct your attention——

Mr. Rosenblatt: Now I ask that the record note that he has been handed some kind of photostat.

The Court: Do you want it marked for identification?

Mr. Rosenblatt: I don't want anything, sir, at this point.

[fol. 642] Mr. Winsten: I am going to have this letter marked for identification now.

(Paper marked Plaintiff's Exhibit 31 for identification.)

Q. Now, in this paper, plaintiff's Exhibit 31 for identification, there is a statement as follows:——

Mr. Rosenblatt: I object to any reading——

Mr. Winsten: I now offer in evidence, if your Honor please, the following part of the letter, which is Plaintiff's Exhibit 31 for identification. The only part that I am offering is the pertinent portion in this examination.

The Court: Show it to counsel.

Mr. Winsten: If your Honor please, I am not offering the entire letter. I am only offering one sentence of this letter at this time, and it is the last sentence of the paragraph beginning, "Dear General Eisenhower," and I would like to read that in evidence, if your Honor please.

Mr. Rosenblatt: Just a moment. First of all, this is not an original of anything. There is no letter here. Secondly, I have not even read this document that has been marked for identification.

Mr. Winsten: Haven't you read the part I am offering?

Mr. Rosenblatt: I have not even read that. I just started to read it when you took it away from me. I have a right, if your Honor please, before I read anything, to read the whole thing.

The Court: Go ahead.

[fol. 643] Mr. Winsten: I don't think, your Honor, that he has the right to read the whole thing, but in the interest of saving time, if your Honor pleases——

The Court: Suppose there is some other part in that letter which explains the part that you want to offer?

Mr. Rosenblatt: It is not even an offer, if your Honor please. Let me make the preliminary objection. I object to it on the ground that it is a photostat of something and it is not an original of anything. I object to the document itself or any part thereof, on that ground.

Mr. Winsten: The witness has just testified that this has his signature, that is, the defendant's signature.

Mr. Rosenblatt: That does not make any difference. It is a photostatic reproduction of something.

Mr. Winsten: Is counsel going to press that objection?

Mr. Rosenblatt: Yes, I do.

Mr. Winsten: I believe that a photostat of a letter is just as admissible as the original.

Mr. Rosenblatt: Since when? Not unless you can explain the absence of the original.

The Court: You have to lay the foundation for it.

Mr. Rosenblatt: And you have to show that it was sent to——

Mr. Winsten: I will show it was written by the defendant and that's all.

Q. Mr. Harmon, did you see the defendant since the time you were here in court last?

A. Yes.

[fol. 644] Q. Where did you see him?

A. In Miami, Miami Beach.

Q. And where is he living?

A. I don't know the street address. He is living in Miami Beach.

Q. When did you go down there to see him?

Mr. Rosenblatt: I object to that. This has nothing to do with this case.

The Court: I will allow it.

A. Your question was when did I go down to see him?

Q. Yes.

A. I did not go down to see him.

Q. Well, you were here in New York two weeks ago, were you not?

A. That's right.

Q. And did you see him since you were in court here last?

A. You say did I see him?

Q. Yes.

A. Yes, I did. I answered that question.

Q. You said you saw him in Florida?

A. That's right. You asked me when did I go to Florida?

Q. Yes.

A. I think the case closed here—a week ago Friday.

Q. On the 14th?

A. I went down that evening, I believe.

Q. And how long did you stay there?

A. I was there just about a week.

Q. Were you with the defendant all that time?

A. No, I was not.

Q. How much time did you spend with the defendant?

A. Oh, I would say possibly an average of two hours a day.

Q. Were you living with him down there?

A. No, I was not.

Q. Did you occupy quarters near where he was living?

A. The night I arrived he was also a guest at the home wherein I was a guest.

[fol. 645] Q. And whose home is that?

A. Ed Parker.

Q. And did you remain there?

A. Yes, I remained at Parker's.

Q. For the entire week?

A. Yes.

Q. And did the defendant remain there?

A. No.

Q. He left there?

A. Yes.

Q. How long after you got there did he leave Ed Parker's?

A. The next day.

Q. And what did the defendant do down there during the week you were there?

Mr. Rosenblatt: I object to that.

The Court: Objection sustained.

Mr. Winsten: That is all.

The Court: All right; step down.

Mr. Rosenblatt: Defendant rests and makes the following motions.

The Court: Just a minute. Does the plaintiff rest?

Mr. Winsten: Plaintiff rests.

The Court: Both sides rest.

Motion to Strike Out Testimony and Ruling Thereon

Mr. Rosenblatt: I move first to strike out all testimony taken since the dismissal of the complaint herein on its merits.

I move to strike out all testimony as to attorney's services rendered prior to this trial, upon the grounds that there may be no allowance for such services when the complaint is dismissed, and upon the further ground that the allow-

ance if at all proper, may only be made in connection with an allowance under Section 1170-B.

The Court: Let me get one motion out of the way first. The motion to strike out all testimony subsequent to the decision of this Court in connection with the recogni-[fol. 646] tion of the Nevada decree is denied, with an exception.

Mr. Rosenblatt: I further move to strike out all testimony having reference to maintenance or counsel fees, under Section 1170-B—if at all proper—on the ground that they may only be prospective and not relate to a time prior to the denial of this separation action and the dismissal of the plaintiff's complaint.

MOTION TO DISMISS AND RULING THEREON

I further renew defendant's motion to dismiss this application under Section 1170-B, on all grounds heretofore and previously stated.

May it please the Court, the defendant respectfully requests permission to submit a brief.

The Court: All right.

Mr. Winsten: If your Honor please, I would like to have an opportunity not only to answer the brief, but also to be given the benefit of the minutes that the defendant's counsel has ordered and has the benefit of at the time of the preparation of his brief, so that whatever time is allowed by the Court for the filing of the brief I should be given a reasonable time thereafter to answer it with the benefit of the testimony.

Mr. Rosenblatt: Perfectly agreeable, and I will be glad to loan him the minutes.

Mr. Winsten: Have you an extra copy that I could have now?

Mr. Rosenblatt: No, I have not, my friend.

The Court: Decision reserved on your motions.

[fol. 647] Mr. Winsten: And I would like to have the record indicate that I move for an allowance of counsel fees and maintenance and support, the maintenance and support to be retroactive to the date of the commencement of this action.

The Court: Off the record——

(Colloquy between the Court and counsel, off the record.)

(The defendant to file on or before Wednesday, February 2, 1955; the plaintiff to file on or before Monday, February 7, 1955.)

Mr. Rosenblatt: May it please the Court, I have a motion to make orally.

I have asked for a vacating of this sequestration order up to one-half. I think technically after the dismissal of the complaint I was entitled to get a vacating completely. However, I have asked for the vacating of one-half of the amount which has been sequestrated, with a direction to the receiver to pay it over.

Mr. Winsten: If your Honor pleases——

The Court: Of the record——

(Colloquy between the Court and counsel, off the record.)

The Court: Decision reserved.

[fol. 648] SUPREME COURT—SPECIAL TERM, PART IX.

OPINION OF DI FALCO, *J.* (1/17/55)

Vanderbilt v. *Vanderbilt*.—The first affirmative defense interposed by the defendant to this complaint for a legal separation is the fact that the defendant obtained a final decree of absolute divorce from the plaintiff on June 30, 1953, in the Second Judicial District Court of the State of Nevada, in the County of Washoe. That decree is in evidence.

Plaintiff seeks to impeach the bona fides of the defendant's domicile in Nevada, thereby attacking the validity of the Nevada decree.

Under the holdings of the United States Supreme Court in the well-known case of Williams v. North Carolina (317 U. S.), and the line of cases following in record, including our own Court of Appeals, in the Matter of Holmes (291 N. Y.), and cases thereafter also in accord, it has been firmly established that a decree of a sister state is entitled

to and must be given full faith and credit here, unless the party assailing the validity of such domicile upon which the decree is founded adduces proof sufficient to satisfy the court of this state that such domicile was false and constitutes a fraud upon the decreeing court.

The burden of proof in this respect is upon the person who assails the validity of that decree, and in this case, of course, is upon the plaintiff.

Firmly established is the fact that the validity of the decree being recognized as a valid decree of a court of [fol. 649] competent jurisdiction of a sister state, the burden of proof to set this decree aside rests heavily upon the plaintiff.

Plaintiff contends that the defendant has not established a residence of any particular place in any state, but that he established one to suit his own convenience at the moment, and shifted from place to place.

In my opinion the proof presented by plaintiff to disprove the bona fides of the defendant's domicile in Nevada upon which his decree is bottomed is totally lacking in probative force and weight. Plaintiff's proof is meager, and has failed to meet the burden of proof required of her to establish by a preponderance of credible evidence that the defendant was not a bona fide resident of the State of Nevada at the time he obtained his decree of divorce there, or that he had not complied with the necessary requirements with respect to the laws of that state.

Implicit in the decree of Nevada is the finding of the jurisdiction of the person and subject matter of the proceeding, the validity thereof, and the compliance of the defendant with all the legal requirements of that state.

Furthermore, the additional testimony and documentary evidence presented now before me on behalf of the defendant establishes his residence and domicile in the State of Nevada for some period in years preceding the obtaining of his divorce there. We have the evidence of his tax returns, voting records for years, automobile registration and the renewals thereof in the State of Nevada, and furthermore of his apartment and business connection there and other businesses, the fact that he resided there before his marriage to the plaintiff, and that he has con-

[fol. 650] sistently over the years stated at various times and shown intent that Nevada was his place of domicile.

It is apparent from the proof that many years prior to his marriage to the plaintiff the defendant had planted his "grass roots" in Nevada, and continued this conduct to a great extent even after his marriage, though he led a life of a much and varied traveller in his work and business and other activities.

Upon his break with the plaintiff the defendant returned to his old "stamping ground". This was not a new and strange territory or jurisdiction or a new haven sought for the purpose of establishing a colorable residence for the securing of a divorce as is claimed by the plaintiff.

Upon the record as it stands before me I find and decide that the plaintiff has failed to factually overcome the presumption of the validity of the defendant's Nevada decree, has failed to present any proof of probative force, and has not met or sustained the burden of proof required.

The first affirmative defense of the defendant, therefore, is a bar to the plaintiff's action for a separation, and, being sustained, the complaint bearing on this issue must be dismissed upon the merits.

In this respect this constitutes the opinion of the court pursuant to section 440 of the Civil Practice Act.

However, pursuant to the provisions of the statute, particularly and specifically section 1170-b of the Civil Practice Act, in cases such as this made and provided, I will take the proof from both parties as to their incomes and earnings and such other information as may be required and pertinent in connection with the issue of maintenance and support to be awarded, if any, to the plaintiff.

[fol. 651] SUPREME COURT—SPECIAL TERM
PART IX

OPINION OF DI FALCO, J (2/21/55)

Vanderbilt v. Vanderbilt, Jr.—This is an action by the plaintiff against her husband for a separation on the grounds of cruelty, abandonment and non-support. De-

fendant interposed, as an affirmative defense constituting a bar to this action, a final decree of absolute divorce which he obtained from plaintiff on June 30, 1953, in the State of Nevada. Plaintiff challenged the bona fides of defendant's domicile in Nevada, thereby attacking the validity of that decree. The evidence of the parties was taken in respect thereof and, at the conclusion of that phase of the case, I rendered my decision (N. Y. L. J., January 17, 1955). The decision is herein incorporated by reference. I found for the defendant and dismissed plaintiff's complaint on that issue, namely, that the Nevada decree constituted a bar to plaintiff's action for separation.

However, though her action has been dismissed for the reasons stated, plaintiff makes claim for maintenance pursuant to the provisions of section 1170-b of the Civil Practice Act. Accordingly, the proof of the parties was taken as to their finances, income, and plaintiff's needs, in the event I resolve this issue of maintenance in her favor, Section 1170-b is a statute of recent enactment (L. 1953, chap. 663, April 13, 1953). The present action appears to be the first of its kind in respect of the issues raised as to the validity, application and constitutionality of the [fol. 652] statute. The precise question has not as yet been squarely determined in any discovered decision of our courts. In view of the novel and legal issues presented, a study and analysis of the statute, its background and origin, is necessary. Defendant contends that section 1170-b may not lawfully be applied to the facts as are here presented and, in any event, contends the statute is unconstitutional.

The facts adduced at the trial before me are the following: The parties were married in Connecticut in September, 1948; at the time of the marriage defendant was domiciled in Nevada and plaintiff was domiciled in California; a few months after the marriage the parties became jointly domiciled in California. They separated in September, 1952. Plaintiff, in October, 1952, commenced a prior separation action against defendant in this court, which was dismissed by order of this court dated February 27, 1953, on the determination that plaintiff, as of October 1, 1952, had not resided continuously for one year in the State of New York before the commencement of that action. Thereafter, the

defendant procured a decree of absolute divorce against plaintiff on June 30, 1953, in Nevada. That decree was obtained ex parte and plaintiff did not appear or answer therein. Plaintiff thereafter, still continuing her residence and domicile in the State of New York, commenced this present action for separation against the defendant; her complaint is verified April 5, 1954, and avers that plaintiff was a resident continuously for more than one year prior to the commencement of the action (sec. 1165-a, subdiv. 3, C. P. A.); plaintiff was therefore a resident of this state at [fol. 653] the time of the effective date of section 1170-b; defendant was served by order of publication herein, and, on the same date that the order for publication was made, an order or sequestration was granted herein, directing the seizure by the receiver named of defendant's property within the State of New York; the receiver thereupon acquired custody and control of moneys and property of the defendant and is still holding such property and moneys. Pending the publication aforementioned, defendant, on April 30, 1954, appeared specially herein and moved to dismiss this action for lack of this court's jurisdiction over his person and of the subject matter of the action, and further, to vacate the order of sequestration, which motion was denied in all respects; thereafter, on July 1, 1954, defendant interposed his answer preserving his special appearance and objections to the jurisdiction of this court over his person and the subject matter herein. Plaintiff moved for an award of alimony and counsel fees pendente lite, which was denied to the extent of the alimony but allowed a counsel fee of $2,500 (further reference to the award will be hereinafter made). The trial proceeded before me; the validity of defendant's Nevada decree was not successfully attacked by plaintiff. I then, as aforestated, took proof upon plaintiff's application for maintenance pursuant to section 1170-b. One of the issues raised by defendant is whether or not, upon the facts adduced, plaintiff comes within the application of section 1170-b. Did the Legislature intend this statute to cover a factual situation such as is presented by plaintiff? In my opinion, the statute is framed in unambiguous language and appears [fol. 654] to be clearly applicable to plaintiff. It reads as

follows: "§1170-b. *Maintenance of wife where divorce or annulment previously granted on non-personal jurisdiction.* In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this section shall extend to unpaid sums or installations accrued prior to the application as well as to sums or instalments to become due thereafter."

Defendant contends (1) that this is not a proper case to which section 1170-b applies because plaintiff completed her one year of legal residence in this state (sec. 1165-a, subdiv. 3 C. P. A.) after section 1170-b was enacted and after a valid divorce was obtained by the defendant; (2) that neither party had a marital domicile here in the State of New York and that plaintiff is not a "New York wife" intended by the Legislature to be protected by this statute; and (3) that, in any event, section 1170-b is unconstitutional for the reasons that it discriminates against foreign divorces and denied the defendant, a non-resident, [fol. 655] protection of the laws equal to that afforded New York husbands.

The starting point in this discussion must necessarily be to consider the Legislature's intent when it enacted section 1170-b. I have had occasion to discuss inquiry into legislative intent in the case of Art Steel Co. v. Velazquez (201 Misc. 141; aff'd 280 App. Div. 76), at page 144, as follows: "The intent with which statutes are enacted 'is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and remedy in view' (1 Kent's Commentaries 462; see, also,

McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.] sec. 95). Our Court of Appeals has pointed out that courts "do not merely read the bare end product of the legislative labors' but rather 'read the statute in the light of the state of facts which were found by the Legislature, and which prompted the enactment' (St. Nicholas Cathedral of Russian Orthodox Church in America v. Kedroff, 302 N. Y., 1, 31); and that 'statutes, directed against known and stated evils, are not to be stretched to cover situations having no regard or reasonable relation to those evils' (Metropolitan Life Ins. Co. v. Durkin, 301 N. Y., 376, 381)." I turn, therefore, to a study of the background of the statute in question to ascertain the objects and remedies which prompted the Legislature of the State of New York to enact section 1170-b of the Civil Practice Act.

It is now well established, since the decision of the United States Supreme Court in the second case of Williams v. North Carolina (325 U. S., 226, 65 Sup. Ct., 1092), that under the full faith and credit clause of the Consti- [fol. 656] tution a sister state is required to give full faith and credit to an ex parte decree of divorce obtained in another state only to the extent that the decree of divorce adjudicated the marital res and marital status of the parties. As a result of this decision experience thereafter proved that sister states were confronted with the problem of providing financial assistance to abandoned wives, in the face of the recognition of a husband's ex parte divorce. Were they to be left helpless by such foreign ex parte decrees? The courts have sought to meet and alleviate the situation by an ever broadening approach and consideration to these legal and social problems. Experience and wisdom have gradually resolved a more realistic approach thereto, whittling away at former old-fashioned legalistic barriers. It is obvious today, in the light of more broadened decisional law, that the judicial process, working itself through the constant, ever-changing problems presented, is making decided headway in solving the dilemma of the Bench, Bar and legal writers in this field of law. In this evolution of the law our United States Supreme Court recently evolved and enunciated the principle that a divorce decree obtained in a sister state, where

the wife was not present and who had not been served with process in that state, and who did not appear in that action, need not be given full faith and credit to the extent of relieving the husband from his obligation to support his wife, although that decree may be valid to dissolve the marital status of the parties. These principles are now firmly established by the cases of Esenwein v. Esenwein (325 U. S. 279, 65 Sup. Ct., 1118), Estin v. Estin (334 U. S. 541, 68 Sup. Ct., 1213), and May v. Anderson [fol. 657] (345 U. S. 528, 73 Sup. Ct., 840). In the Estin case (supra) the husband's argument that his obligation to support his wife terminated with the legal dissolution of the marriage as soon as the relationship of husband and wife no longer existed was answered in the majority opinion at pages 1217 to 1218, as follows: "New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. The problem of her livelihood and support is plainly a matter in which her community had a legitimate interest. * * * The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each state to the matters of her dominant concern."

Mr. Justice Douglas, who wrote the majority opinion in the Estin case, also wrote the prevailing opinion in the first Williams case (317 U. S. 287, 63 Sup. Ct., 207) and wrote a concurring opinion in the Esenwein case (supra) where he pointed out that it was important to preserve the basic distinction between the concept of marital capacity and the concept of support for the wife, and that the Williams case involved only the issue of marital capacity. At page 1119 of the Esenwein case we find the following: "We held in Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273, that a Nevada divorce decree granted to a spouse domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse [fol. 658] who obtained the Nevada decree was being prosecuted in North Carolina for living with the one

woman who Nevada recognized as his lawful wife. Quite different considerations would have been presented if North Carolina had merely sought to compel the husband to support his deserted wife and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance of support in another State by showing that he was domiciled in the State which awarded him the divorce decree." Mr. Justice Douglas continued (pp. 1119-1120): "It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served (see Yarborough v. Yarborough, 290 U. S. 202, 54 S. Ct. 181, 78 L. Ed. 269, 90 A. L. R. 924; Davis v. Davis, 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A. L. R. 1518). But I am not convinced that in the absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance and support of the other spouse or the children (see Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565). The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two states. * * * The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States (see Williams v. North Carolina, supra). One must give way in the larger interest of the federal union. But the same conflict is not necessarily present when it comes to maintenance and support. The State where the deserted wife is [fol. 659] domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized."

The New York State Law Revision Commission confronted with the problem presented conducted a very thorough and exhaustive inquiry and analysis of these precedents and enunciations of the statutes and decisional law of the courts. The commission prepared a very comprehensive report wherein it recommended the enactment of the new statute—1170-b of the Civil Practice Act. It would

be unnecessary and burdensome to repeat either in hæc verba or even in resume the report (Legislative Document [1953], No. 65[k]), but at page 6 thereof it is stated: "The Commission believes that legislation is necessary to protect a New York wife whose right to support from her husband may now be completely cut off by an ex parte foreign divorce decree, in the absence of a previous New York separation decree with provision for maintenance. In order to avoid discrimination against foreign divorces, against which the *Estin* opinion warned, such legislation should be made applicable whether the husband's ex parte adjudication of marital status was obtained in a foreign court or a New York court. The Commission therefore recommends that the Civil Practice Act be amended by the addition of a new section 1170-b * * *."

The report analyzes the case of Estin v. Estin (supra), which pointed out the injustice to a New York wife whose husband obtained a divorce in another state in an ex parte proceeding, and stated, that unless she had been able to [fol. 660] get a separation order with maintenance, prior to the foreign divorce, she has no remedy. The report further emphasizes the following: That under the Civil Practice Act, maintenance of the wife may be granted only as an incident to relief in a matrimonial action, and since 1883 it has been accepted law that there is no inherent power in the Supreme Court to grant maintenance to a wife independent of statutory authority (Ramsden v. Ramsden, 91 N. Y., 281), that (Report, p. 5) an order for maintenance of a wife, after a foreign divorce decree, is not obtainable in the Domestic Relations Court of the City of New York (Domestic Relations Court Act, secs. 91, 137; Adler v. Adler, 192 Misc., 953, 81 N. Y. S., 2d 797 [Dom. Rel. Ct. 1948]); and, furthermore, that by the recent amendment to the Civil Practice Act, section 1170-a, the Supreme Court was authorized to render judgment with respect to the custody and maintenance of children where divorce, separation, annulment or a declaration of nullity of a void marriage has been denied for any reason other than a lack of jurisdiction; that the legislation proposed (sec. 1170-b) complements section 1170-a by extending similar protec-

tion to wives and the relief will be enforceable in the same manner as in any other matrimonial action (report, p. 5).

Of decided further interest on the subject is the portion of the report (p. 12) in respect of the situation in our Domestic Relations Court. It is pointed out that in the case of Adler v. Adler (supra) a petition was filed in the Domestic Relations Court by a wife whose husband had obtained a valid foreign divorce decree, apparently ex parte, [fol. 661] wherein she sought support under the Domestic Relations Court Act. The petition was "regretfully" dismissed for lack of a New York judgment prior to separation. Such a prior judgment has been held in the Domestic Relations Court to be within the protection of the Estin rule by one justice of that court (Gittelman v. Gittelman, 192 Misc. 334, 80 N. Y. S., 2d 695) and denied by another ("Morton" v. "Morton," 99 N. Y. S., 2d 155) in view of the language of section 137(1) of the Domestic Relations Court Act.

The holdings thus indicate the basic difficulty in our court is that statutory authority is lacking to grant alimony except pursuant to the matrimonial actions specified in the Civil Practice Act (secs. 1140, 1155, 1164, 1169-70), and since the oft-cited case in 1883 (Ramsden v. Ramsden, supra) it has been accepted law that there is no inherent power in the Supreme Court to grant support for the wife. Further, at page 13 of the report, it is stated: "Since, therefore, the Children's Court Act does not authorize support for wives generally, the Domestic Relations Court can order support only for wives who have not been divorced, and the Supreme Court is limited to statutory actions, none of which authorize support for a spouse whose marriage has already been dissolved by a foreign decree, the New York courts do not appear to have jurisdiction to compel support despite a valid foreign divorce decree."

With this background and collation of decisional law presented by the commission showing the need for affirmative legislation on the subject, our Legislature thereupon enacted section 1170-b of the Civil Practice Act. As stated at page 3 of the report: "Its purpose is to authorize the [fol. 662] Supreme Court to provide for the maintenance

of a wife where the husband had previously obtained a divorce, annulment, or a declaration of nullity of a void marriage from a court which did not have jurisdiction over her person."

I am convinced that plaintiff comes within the purview and protection of this statute. She has been a domiciliary and resident of this state for more than a year prior to the commencement of this suit (April 5, 1954). She was, therefore, a resident at the time of the effective date of section 1170-b (April 13, 1953) and entitled to bring this action under section 1165-a (3) of the Civil Practice Act. Defendant procured his ex parte divorce in Nevada on June 30, 1953. Concededly, plaintiff was not served in Nevada and did not appear or answer in that action. The present dismissal of plaintiff's separation action was made, as I pointed out, solely by reason of the bar of defendant's prior Nevada decree which was not here successfully challenged by plaintiff. In view of the report and recommendations of the Law Review Commission for the enactment of section 1170-b of the Civil Practice Act, I am persuaded that the language of the statute clearly encompasses plaintiff. Defendant's contention that the statute will induce wives in foreign states to come to New York State to take advantage thereof, is not merely fallacious, it is completely without basis and untenable. The situation, if ever it proved of such consequence as to require remedy, would, of course, necessarily be the subject of legislative attention—not of the court. The present enactment is, in my opinion, clear and unambiguous. If the Legislature had other intentions, it could have clearly provided therefor [fol. 663] and specified, as a requisite to relief under the statute, a period of residence or other requirements in this state by a wife prior to her suit in the face of the ex parte foreign divorce decree obtained by her husband. The matter of discrimination was covered in the recommendations of the Law Review Commission, and, with that before it, I cannot but conclude that the Legislature intended this statute to apply to ex parte adjudications rendered in New York courts as well as those obtained in foreign courts. Defendant's attack on the constitutionality of the statute is rejected. The constitutionality of section 1170-b, in

effect, was predetermined by the United States Supreme Court in the decisions hereinbefore referred to, wherein the doctrine of divisible divorce is enunciated. Section 1170-b is a New York State codification of that doctrine in our statute law, and the incorporation thereof is a part of the public policy of this state.

It is further significant to note the following language in Morton v. Morton (199 Misc., 547), at page 557: "Doubtless it would be consonant with the full faith and credit clause and within the New York State constitutional power of the Legislature to have enacted the bill, introduced and killed at the 1948 session (Sen. Int. No. 2366. Print No. 2611), which would have added to the Civil Practice Act a new section to provide that 'when the last joint matrimonial domicile was within the State of New York, and the husband acquires domicile or residence outside of the state and obtains a valid separation or divorce decree and the wife neither appeared nor was served in jurisdiction thereof, the wife shall have a cause of action for support and for education and maintenance of the children of the marriage.'"

[fol. 664] This statute, containing specific restrictions was defeated. The bill as eventually passed (sec. 1170-b, C. P. A.), is a much broader, all-inclusive statute, with no limitations or restrictions whatever. It embraces plaintiff. Defendant argues that plaintiff does not come within the application of the statute because both parties are not domiciliaries of this state, or that plaintiff is not a domiciliary of the state, and that the statute applies only to New York domiciliaries where the marital domicile was in this state and the husband had departed therefrom. I am not disposed to accept defendant's narrow construction of section 1170-b. His argument is without basis in the record. The facts are established that, although the parties had been married in Connecticut, that was neither the domicile nor residence of defendant or plaintiff. Their mode of life was one of constant luxurious travel, with periodic places of residence or domicile. They took up a short residence or domicile in California after the marriage. There is proof in the record that at one time these parties had looked for an apartment in New York. I cannot subscribe to defend-

ant's argument that plaintiff may not achieve her own domicile or residence in any state she chooses, after the separation of the parties under the circumstances and facts disclosed. My conclusion is not overcome by the arguments of defendant which ignore the factual situation presented by plaintiff. Plaintiff had as much right to establish a domicile or residence here, which she did, as did defendant in Nevada. Defendant failed and refused to support plaintiff, and returned to the State of Nevada for the purpose of re-establishing his domicile and there instituted his divorce [fol. 665] action against plaintiff. She was not obligated to follow and pursue defendant to Nevada. Plaintiff had lived here before, had been living here for a period of time when separated from defendant, and she met the legal requirements for the institution of this separation action. Moreover, as heretofore pointed out, defendant's motion to dismiss this separation suit, on the ground plaintiff was not a resident, was denied.

I am of the opinion, therefore, that plaintiff is entitled to maintenance pursuant to the provisions of section 1170-b. By reason of the order of sequestration, this court may grant plaintiff allowances for her maintenance and counsel fees out of the funds and property seized and held by the receiver (Matthews v. Matthews, 240 N.Y., 28; Geary v. Geary, 272 N. Y., 390).

Coming now to the amount of the maintenance to be awarded, it is undisputed that, except for a small amount, plaintiff has not received any support or maintenance from the defendant during the pendency of this action nor since the parties have been separated. It is further undisputed that plaintiff is presently receiving the sum of $400 monthly from a charitable institution and that is her sole means of income and support. She is ill and has with her a minor child of a previous marriage. The sum to be awarded this plaintiff is not to be measured or circumscribed by the amount of the charitable aid she received. Section 1170-b does not present any new or different standard for making an award to a wife for her maintenance. Defendant's contention that section 1170-b "wholly fails to provide any standard or measure for the amount of maintenance allowable" is without merit. The standard of

[fol. 666] maintenance, it appears, is an amount "as justice may require." Section 1170 of the Civil Practice Act provides for the support and maintenance of a wife who obtains a judgment of separation or divorce against her husband and states, in the same words as are used in section 1170-b, that the court may grant such maintenance and support for the wife "as justice requires." Despite defendant's contention, plaintiff is not in the same category as a wife whose marriage has been annulled. Plaintiff's rights are the same as they were before the defendant procured his Nevada decree of divorce. The distinction between plaintiff's status and that of a wife whose marriage has been annulled is that, in the case of the annulment, the decree adjudicates that there never had been a valid marriage from its very beginning, whereas in the plaintiff's situation there was a valid marriage and defendant's obligation to support plaintiff survived the ex parte Nevada divorce decree. Since plaintiff's right to maintenance has not been affected by the Nevada decree and is fully protected by section 1170-b, plaintiff is entitled to an award for her maintenance. I hold as being without merit defendant's argument that plaintiff may be awarded only such sum, if any, as will prevent her from becoming a public charge. Nor do I feel that plaintiff is entitled to be maintained in the standard of luxurious life and travel which she enjoyed while married to defendant. She is no longer privileged or required, as she was while married to defendant, to accompany him on his extensive trips and voyages, his lavish entertainment and mode of living, all of which necessitated large expenditures for clothes, traveling, hotels, entertainment, as more fully testified to by plain-
[fol. 667] tiff and described in the record. Neither of these extremes is the test to be now applied. In my opinion, in light of the record before me, plaintiff is entitled now to maintenance in such amount "as justice requires." Studying the report of the law revision commission, I find the words "maintenance" and "support," as used throughout, have the same connotation; they are used interchangeably and no different meaning is either ascribed, stated or implied. Funk & Wagnalls New Standard Dictionary defines the words as follows: "*Maintenance*: 1. The act of main-

taining, in any sense; as, maintenance of a family; * * * 2. that which supports or sustains; means of support * * *." "Support: * * * 3. To supply means for the maintenance of; furnish with what is needed; provide for; as, to support * * * a family. * * * Syn. bear, carry, * * * maintain. * * * To maintain is to keep in a state or condition, especially in an excellent and desirable condition * * *. To *support* may be partial, to *maintain* is complete; maintain is a word of more dignity than support. * * * 2. That which supports, maintains or upholds. * * * 3. One who or that which furnishes a livelihood to a person or family; a source or means of living; also, subsistence; sustenance; living. 4. A maintaining in continuance * * *."

The evidence established defendant's income and financial status to be substantial. He is the beneficiary of the income of several trusts, the particulars of which are more fully stated in the record. Furthermore, defendant enjoys additional income from his lectures and writings.

In view of the foregoing, I find and decide that plaintiff is entitled to maintenance in the sum of $250 weekly, and [fol. 668] to an additional counsel fee of $3,500 which includes expenses incurred. The order of Special Term stated that the allowance there of counsel fee was made "without prejudice to a review at the trial of this cause, of the nature, extent and reasonable value of the services heretofore rendered and hereafter to be rendered by plaintiff's counsel in this action, and to the making of an additional allowance therefor if, at that time, the court deems it proper * * *." The services of plaintiff's attorney were necessary. The amount previously awarded proved inadequate. Plaintiff's counsel testified that, of the sum of $2,500 awarded, he incurred expenses of approximately $1,500. Defendant argues that, since plaintiff is an unsuccessful litigant, her complaint having been dismissed, she is not entitled to a counsel fee. Plaintiff's separation was denied solely by reason of the bar of defendant's ex-parte Nevada decree. This action is brought both for separation and maintenance. The denial of the separation did not terminate this action, for it continued in respect of plaintiff's application for maintenance and the determination of her

right to maintenance under the statute discussed, both in law and in fact.

This constitutes the decision of the court pursuant to section 440 of the Civil Practice Act.

Settle judgment accordingly.

[fol. 669]

SUPREME COURT
OF THE STATE OF NEW YORK, APPELLATE DIVISION—FIRST DEPARTMENT

PATRICIA W. VANDERBILT, Plaintiff-Appellant,

against

CORNELIUS VANDERBILT, JR., Defendant-Respondent,

and

THOMAS F. McCOY, Receiver and Sequestrator-Respondent

STIPULATION RE EXHIBITS—JUNE 14, 1955

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED by and between the attorneys for the respective parties hereto that the printing of the exhibits shall be dispensed with, and that either party shall submit to the Appellate Court, at the time of the argument or submission of the appeal, the original of those exhibits which are in possession of the respective parties and copies of those exhibits which are filed papers. The said exhibits are described as follows:

[fol. 670] PLAINTIFF'S EXHIBITS

Exhibit No.	Description
1	Marriage Certificate.
2 for Id.	Telegram dated December 12, 1950 from "Nick" to the plaintiff.
3	Affidavit of Thomas F. McCoy, dated January 10, 1955.
4	Telegram dated December 12, 1950 to the plaintiff from "Me."

Exhibit No. Description

5—Telegram dated September 3, 1952 to plaintiff from "Me."

6—Lease dated September 1, 1952.

7—Telegram dated September 5, 1952 to the plaintiff from "Neil."

8—Letter dated July 29, 1953 from defendant to Esther W. Gilbert.

9 for Id.—Book, "Cornelius Vanderbilt, Jr.'s Personal Travel Directory for Europe."

10—Will of Grace Graham Vanderbilt.

11—Order of publication made by Mr. Justice William C. Hecht, Jr., dated April 21, 1954 (printed at fols. 52-57 of defendant-appellant's record on appeal).
Affidavit of Arthur J. Cavanaugh, sworn to June 1, 1954.
Affidavit of Jack Aaron, sworn to June 1, 1954.
Affidavit of Monroe J. Winsten, sworn to April 22, 1954.
[fol.671] Summons and complaint (printed at fols. 58-84 of defendant-appellant's record on appeal).
Notice dated April 21, 1954 (printed at fols. 49-51 of defendant-appellant's record on appeal).
Order of sequestration made by Mr. Justice William C. Hecht, Jr., dated April 21, 1954 (printed at fols. 21-48 of defendant-appellant's record on appeal).

12—Newsletter, "Vagabonding with Vanderbilt," dated May 15, 1953 (2 pages printed on 4 sides).

13—Newsletter, "Vagabonding with Vanderbilt," dated August 15, 1953 (2 pages printed on 4 sides).

14—Post Card bearing postmark March 18, 1953.

15—Affidavit of A. L. Manierre, dated January 10, 1955.

15A—Affidavit of A. L. Manierre, dated January 11, 1955.

16—Letter consisting of 3 pages, typewritten on 5 sides from defendant to plaintiff, signed "Me."

17—Omitted. Not marked in evidence.

18—Photostatic copy of proceedings before Army Retiring Board in the case of Maj. Cornelius Vanderbilt, Jr., dated April 14, 1943, consisting of 11 pages.

19—Affidavit of Cornelius Vanderbilt, Jr., sworn to November 18, 1952.

Exhibit No. Description

[fol. 672] 20—Affidavit of Cornelius Vanderbilt, Jr., sworn to January 15, 1953.

21—Newsletter, "Vagabonding with Vanderbilt," dated February 10, 1953.

22—Letter dated December 6, 1952 from Cornelius Vanderbilt, Jr., to Judge John S. Sinai consisting of 2 pages, typewritten on 4 sides.

23 for Id.—Minutes of Executors' meeting held on January 22, 1953, consisting of 5 typewritten pages.

24—Notice to Produce.

25—Letter from "Me" to plaintiff consisting of 1 page, typewritten on both sides.

26—Order of Mr. Justice Rabin, dated July 15, 1954.

27—Post Card from "Neil," postmarked March, 1953.

28—Affidavit of A. L. Manierre, dated January 21, 1955.

29—Affidavit of Thomas F. McCoy, dated January 24, 1955.

30—Itemized statement of disbursements.

31 for Id.—Photostat of letter dated June 11, 1952 from "Neil V." to Craig, consisting of 3 typewritten pages.

[fol. 673] Defendant's Exhibits

A—Exemplified copy of Nevada divorce proceedings and decree, dated June 30, 1953.

B—California operator's license, certified December 11, 1952.

C—California auto registration, certified December 11, 1952.

D—California voting registration, certified November 21, 1952.

E for Id.—6-page letter, dated January 14, 1951, signed "Dave."

F—Report of Referee Harold S. Lazar, dated January 13, 1953 (prior action).

G—Order of Mr. Justice Greenberg, dated February 27, 1953 (prior action).

H—Order of Mr. Justice Rabin, dated July 3, 1953 (prior action).

I—Printed in defendant's separate record on appeal (fol. 36), also included in defendant's Exhibit "A."

Exhibit No. Description

J for Id.—7 documents in the case of Schroeder v. Vanderbilt.

K for Id.—California 1950 Income Tax Return.

L for Id.—"Vagabonding with Vanderbilt," dated March 8, 1953.

[fol. 674] M—Letter signed "me too," dated February 1, 1951.

N—Letter signed "Me too," dated Fri. Morn.

O—Defendant's affidavit, sworn to November 18, 1952 (prior action).

P—Nevada voting registration, certified November 5, 1954.

Q—Nevada voting registration and voting record, certified November 17, 1954.

R—Nevada auto driver's record, certified November 10, 1954.

S—Nevada personal property tax record, certified November 23, 1954.

T—Omitted, as not material to the appeal.

U—Omitted, as not material to the appeal.

V for Id.—Lease dated June, 1953.

W for Id.—Lease dated May 4, 1954.

X for Id.—1949 United States Income Tax Return.

X-1 for Id.—Letter dated March 2, 1953.

Y for Id.—1952 United States Income Tax Return.

Z for Id.—1950 United States Income Tax Return.

AA for Id.—1951 United States Income Tax Return.

[fols. 675-680] It is further stipulated and consented that this stipulation may be submitted to the court for approval by any party without notice to the others.

Dated: New York City,

June 14th, 1955.

Monroe J. Winsten, Attorney for Plaintiff-Appellant, Sol A. Rosenblatt, Attorney for Defendant-Respondent, Jeremiah M. Evarts, Attorney for Receiver & Sequestrator-Respondent.

So ordered, D. W. P.

[fol. 681] SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

PATRICIA W. VANDERBILT, Plaintiff

against

CORNELIUS VANDERBILT, JR., Defendant

Defendant's Notice of Appeal to the Court of Appeals

SIRS:

Please take notice that the defendant, Cornelius Vanderbilt, Jr., hereby appeals to the Court of Appeals from so much of the Order of the Appellate Division of the Supreme Court, First Judicial Department, dated December 20th, 1955 and entered in the office of the Clerk of said Court on December 29th, 1955, and from so much of the judgment entered thereon with costs in the office of the Clerk of the County of New York on December 30th, 1955, as affirms with costs that part of the judgment entered in the above-entitled action in the office of the Clerk of the County of New York on March 31, 1955, which awards plaintiff maintenance and counsel fees and which directs the payment of the amounts thereof by the defendant and by the Receiver and Sequestrator in this action and which awards plaintiff judgment for costs against the defendant in the sum of $375.30 and which directs the payment of the amount thereof [fols. 682-684] by the said Receiver and Sequestrator and which may permit continued retention, collection and payment out by said Receiver and Sequestrator of defendant's funds, money, property and other assets.

Dated: January 3rd, 1956.

Yours, etc., Sol. A. Rosenblatt, Attorney for Defendant, Office & P. O. Address, 630 Fifth Avenue, New York 20, N. Y.

To: Monroe J. Winsten, Esq., Attorney for Plaintiff, Office & P. O. Address, 320 Broadway, New York 7, New York.

Jeremiah M. Evarts, Esq., Attorney for Thomas F. McCoy, Esq., Receiver and Sequestrator, Office & P. O. Address

20 Pine Street, New York 5, New York, Clerk of the County of New York.

[fol. 685] SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

PATRICIA W. VANDERBILT, Plaintiff

against

CORNELIUS VANDERBILT, JR., Defendant

Judgment of Affirmance, Appealed From

An appeal having been taken to the Appellate Division of the Supreme Court, First Department, by the defendant from so much of the judgment of the Supreme Court of the County of New York, duly entered in the Office of the Clerk of the County of New York on March 31, 1955, as awards maintenance, counsel fees and costs, and as directs payments thereof by the Receiver and Sequestrator, as is stated in his notice of appeal; and by separate appeal, plaintiff having appealed to the Apellate Division of the Supreme Court, First Department, from so much of said judgment as denies her a separation and dismisses her complaint for a separation, and in so far as the allowances for maintenance and counsel fees are insufficient, and in so far as the Special Term has failed to adjudicate that the Court acquired jurisdiction of the person of the defendant, as is stated in her notice of appeal, and the said appeals having been heard at a Term of the Appellate Division of the Supreme Court, First Department, held at the Courthouse thereof, in the County of New York, on the 13th day of October, 1955, and an order of said Appellate Division having been made and entered, one Justice dissenting therefrom, affirming the said judgment in so far as appealed from by defendant and by plaintiff, with costs to plaintiff [fol. 686] on her said appeal to be paid by the Receiver and Sequestrator out of the moneys, funds, property and assets which he, as such Receiver and Sequestrator, has received or may become entitled to receive as such Receiver and

Sequestrator, and making the following additional findings of fact with respect to the issue of cruelty:

> "That defendant has violently assaulted plaintiff, and defendant has been guilty of other cruel and inhuman treatment of plaintiff endangering and injuring her health."

Now, on motion of Monroe J. Winsten, attorney for plaintiff, it is hereby

Adjudged, that the said judgment, in so far as appealed from by defendant-appellant-respondent and by plaintiff-respondent-appellant, be, and the same hereby is, affirmed and that Patricia W. Vanderbilt, plaintiff-respondent-appellant herein, recover of Cornelius Vanderbilt, Jr., defendant-appellant-respondent herein, the sum of $1570.07 costs of said appeal, to be paid by the Receiver and Sequestrator out of the moneys, funds, property and assets which he, as such Receiver and Sequestrator, has received or may become entitled to receive as such Receiver and Sequestrator.

Dated: New York, N. Y., December 30, 1955.

ARCHIBALD R. WATSON, Clerk.

Plaintiff's address: 230 East 51st Street, New York City.
Defendant's Address: First National Bank Building, Reno, Nevada.

Filed, Dec. 30, 1955, New York, County Clerk's Office.

[fol. 687] IN THE SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Present: Hon. David W. Peck, Presiding Justice, Hon. Charles D. Breitel, Hon. Earle C. Bastow, Hon. Joseph A. Cox, Hon. Francis Bergen, Justices.

9419-9420

Patricia W. Vanderbilt, Plaintiff-Respondent-Appellant

against

Cornelius Vanderbilt, Jr., Defendant-Appellant-Respondent,

and

Thomas F. McCoy, Receiver and Sequestrator-Respondent.

ORDER OF AFFIRMANCE, APPEALED FROM—Dec. 20, 1955

An appeal having been taken to this court by the defendant-appellant-respondent from so much of the judgment of the Supreme Court, County of New York, duly entered in the office of the Clerk of the County of New York on March 31, 1955, as awards maintenance and counsel fees and costs, and as directs payment thereof by the Receiver and Se-[fol. 688] questrator, as is stated in his notice of appeal; and by separate appeal, plaintiff-respondent-appellant having appealed to this court from so much of said judgment as denies her a separation and dismisses her complaint for a separation, and in so far as the allowances for maintenance and counsel fees are insufficient, and in so far as the Special Term has failed to adjudicate that the court acquired jurisdiction of the person of the defendant-appellant-respondent, as is stated in her notice of appeal; and said appeals having been argued by Mr. Sol. A. Rosenblatt, of counsel for defendant-appellant-respondent, and by Mr. Monroe J. Winsten, of counsel for plaintiff-respondent-appellant, and due deliberation having been had thereon, and the majority opinion, and the dissenting opinion of one of the Justices having been filed herein.

It is hereby ordered and adjudged that the judgment in so far as appealed from by defendant-appellant-respondent and by plaintiff-respondent-appellant, be and the same

hereby is affirmed with costs to plaintiff-respondent-appellant on her appeal, to be paid by the Receiver and Sequestrator out of the moneys, funds, property and assets, which he as such Receiver and Sequestrator has received, or may become entitled to receive as such Receiver and Sequestrator.

And it is further ordered that the following additional findings of fact are hereby found by this court with respect to the issue of cruelty:

> "That defendant has violently assaulted plaintiff, and defendant has been guilty of other cruel and inhuman treatment of plaintiff endangering and injuring her health."

Enter

C.D.B.

[fol. 689] Supreme Court, Appellate Division—First Department, October 1955.

David W. Peck, P. J., Charles D. Breitel, Earle C. Bastow, Joseph A. Cox, Francis Bergen, JJ.

9419, 9420

Patricia W. Vanderbilt, Plaintiff-Respondent,

vs.

Cornelius Vanderbilt, Jr., Defendant-Appellant

and

Thomas F. McCoy, Receiver and Sequestrator-Respondent

Per Curiam Opinion of Appellate Division, First Department

Appeals from judgment of the Supreme Court at Special Term (Di Falco, J.) entered March 31st, 1955 in the New York County Clerk's office. Plaintiff appeals from the judgment insofar as it dismisses the complaint and also insofar as the allowances for maintenance and counsel fees are insufficient; and defendant appeals insofar as the judgment

awards maintenance and counsel fees and costs and directs payment thereof by the Receiver and Sequestrator.

[fol. 690] Sol A. Rosenblatt, of counsel (Charles Roden with him on the brief; Sol A. Rosenblatt, attorney) for Defendant-Appellant.

Monroe J. Winsten, of counsel (Charles L. Raskin with him on the brief; Monroe J. Winsten, attorney) for Plaintiff-Respondent.

Jeremiah M. Evarts for Receiver and Sequestrator-Respondent.

BREITEL, *J.*:

This is a matrimonial action in which plaintiff wife has recovered a judgment, after trial, for maintenance under section 1170-b of the Civil Practice Act. The action, in the first instance, was the classic one brought for separation under section 1161. Because of a valid prior decree of divorce in favor of defendant husband obtained in Nevada, without personal jurisdiction over the wife, relief was denied under section 1161 and alternative relief granted under the new statute, section 1170-b. The judgment in favor of plaintiff wife awarded her $250. a week maintenance from the commencement of the action and additional counsel fees of $3,500.00. The judgment also declared that the Nevada divorce decree in favor of defendant husband was valid and a bar to plaintiff wife's right to a separation. Defendant husband entered a special appearance in the case and the court declined to find, as requested by plaintiff wife, that the defendant husband had made a general appearance, thus making the judgment *in personam*, rather than one *quasi in rem* and limited to enforcement out of sequestered assets.

Both parties appeal. The husband asserts that the statute, [fol. 691] section 1170-b, is unconstitutional and that, in any event, there was no warrant for its application. The wife, on her appeal, contends that the husband's Nevada divorce was proven invalid, that the monetary awards are inadequate, and that the court should have found that the husband had appeared generally in the action.

The judgment should be affirmed in all respects.

The case is one of first impression under section 1170-b,

enacted by Chapter 663 of the Laws of 1953. The statute authorizes a court in a matrimonial action to direct maintenance for a wife "as justice may require", where the court is otherwise barred from granting a divorce, separation or annulment by reason of the prior granting of a judgment or decree for divorce or annulment in an action in which personal jurisdiction was not obtained over the wife.*

The parties were married on September 7th, 1948, in the state of Connecticut. It was the husband's fifth marriage; it was the wife's second. The prior marriages of the parties had been terminated by divorce. At the time of the marriage the husband was domiciled in Nevada. The wife was domiciled in California. Shortly after the marriage [fol. 692] and until the physical separation between the parties in September, 1952, the couple were domiciled in California.

There was no issue of the marriage. The wife has a young daughter by her first marriage.

After the parties physically separated in September, 1952, the wife came to New York and, in October of that year,

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* The statute reads as follows:

"§1170-b. *Maintenance of wife where divorce or annulment previously granted on non-personal jurisdiction.* In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this section shall extend to unpaid sums or installments to become due thereafter."

sued for separation. Her complaint was dismissed on February 27th, 1953, because she had not resided in New York for one year (Civ. Prac. Act, §1165-a, subd. 3). Such dismissal is concededly *res judicata* that there had been no actual matrimonial domicile in New York.

Just before the dismissal of her complaint in the first action, the wife returned to California. She came back to New York on February 12th, 1953, and has remained here since. In March, 1953, the husband sued for divorce in Nevada where he claimed to have resumed his domicile. That action was prosecuted by service of process on the wife outside the state of Nevada. She never appeared in that action and therefore no personal jurisdiction was obtained therein over her. It resulted in a decree in favor of the husband on June 30th, 1953.

In April, 1954, the wife commenced service by publication in this action. The service was completed by June, 1954. The complaint alleged cruelty and abandonment by the husband and asked simply for a separation with support and maintenance. No reference was made to the Nevada divorce which had in the meantime been obtained by the husband. The husband's assets in New York were sequested under section 1171-a of the Civil Practice Act. The husband entered a special appearance, and moved to dismiss the complaint and vacate the sequestration on the ground that the wife was, by reason of the Nevada decree, an ex-wife, [fol. 693] and that therefore there was no jurisdiction over the person, or the action. The motion was denied with leave to interpose the defense in the husband's answer (133 N. Y. S. 2d 314). This he did, and purported thereafter to defend the case only on the questions that the wife had no domicile in New York, that there was no matrimonial domicile in New York, and that there was no marital status upon which to base the complaint or the sequestration. He did not attend and made no attempt upon the trial to meet by his own testimony or that of other witnesses the issues of cruelty and abandonment.*

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* On this appeal the husband contends that he had no opportunity to meet these issues, but that is not so. The trial court clearly indicated that after it would decide the motion to dismiss at the close of the wife's case, the husband could meet any issues that he considered relevant.

The prime issue tendered is whether a wife, who had never theretofore obtained judicial provision for her support, can maintain an action resulting in a direction for maintenance, after divorce in an action brought by the husband in which she was not served personally within the jurisdiction and in which she did not appear nor did she defend. If the answer to that question is in the affirmative then the next issue is whether on the record the court was authorized to direct maintenance for the wife on the ground that justice so required.

Before the decisions in *Williams* v. *North Carolina* (317 U. S. 287; 325 U. S. 226) the legal concept had prevailed for some time that a valid divorce established an indivisible unitary status, even in a case where the defendant had not been served personally or appeared. This would be true in either the divorcing state or the state of the wife's domicile. In either state, at least as to the same individual, the divorce was totally recognized or could be totally ignored. [fol. 694] But it could not, in either of the states, be partly recognized and partly ignored. (*Haddock* v. *Haddock*, 201 U. S. 562.)

In the *Williams* cases the concept evolved that a divorce, based on constructive service alone, could, even in one state, be divisible. Later, the concept was advanced to a further stage, namely, that the marital status between the parties might be severed but that, despite such severance, the husband's economic marital obligation could survive. This development reached its clearest expression in *Estin* v. *Estin* (334 U. S. 541, affirming 296 N. Y. 308). In the Estin case it was held that a wife who had not been personally served or appeared was, nevertheless, entitled to enforce as a continuing right a judgment for separation obtained before the husband's decree of divorce in another state. In *Lynn* v. *Lynn* (302 N. Y. 193) it was made quite clear that the divisibility of the divorce decree obtained outside the state would not share the same character of divisibility if the wife appeared or defended the action brought outside the state for a divorce. It was therefore held that a prior support judgment yielded to the overriding effect of the Nevada decree obtained by the husband. In so holding, however, the court reaffirmed the concept of divisible divorce insofar as it applied to divorce decrees obtained on con-

structive service alone. Said Judge Fuld, on behalf of the court: "The 'divisible divorce', anomalous though it may at first appear, has become a recognized concept; it is now familiar law that a divorce decree may be completely effective to dissolve a marriage and yet completely ineffectual to alter certain legal and economic incidents of that marriage". (pp. 200-201)

[fol. 695]. What has happened then is that the courts, confronted with legislative difficulties in this area, have fashioned new concepts to meet the peculiar problems arising from the interplay of migrant divorce, the constitutional doctrine of full faith and credit, and the special interest of a state in protecting its residents. Because the fashioning of these concepts is still in process, they, indeed, as Judge Fuld said, appear anomalous. The result is, however, that a divorce obtained on constructive service alone now has an effect merely limited to marital status, as distinguished from the obligations that arise from that marital status. This may not satisfy those who seek systematic consistency in the law and certainty of status in matrimonial relations, but its advocates hope that it represents a more realistic approach.

Yet, in the limited area with which we are now concerned, it would not be true to say that divisibility of marital status and the obligations that flow from it is entirely new. Divisibility always existed as between the spouses to a valid divorce based on constructive service alone. (See *Rigney* v. *Rigney*, 127 N.Y. 408, rev'd. on other grounds, *sub. nom. Laing v. Rigney*, 160 U. S. 531; *Haddock* v. *Haddock*, *supra*.) That, however, was a kind of vertical divisibility between the parties—one could be divorced and the other not. Now the concept of divisibility moves horizontally between the parties to separate the marital status from the marital obligations in each—both may be divorced for some purposes and not divorced for others.

Evidently, where we now stand, the valid divorce based on constructive service alone appears to be limited to the narrow status of marriage for purposes of remarriage and possible bigamy prosecution. At least, this would seem to [fol. 696] be so insofar as the courts have passed on its effects. Certainly, however, the support obligations which

derive from marital status are affected only by judgments in which the court has personal jurisdiction of the defendant.

Apart from rationale, the net effect produced by recent decisional law has been to afford severable support status for a wife divorced by constructive service alone, and only where she had prior judicial provision for support. For the wife who had not, prior to such constructive service divorce, obtained a judgment or order for support, there was no available remedy. This was foreseeable in the *Estin* case. To many, this seemed an unfair discrimination.

In 1953, on the recommendation of the Law Revision Commission, the Legislature enacted section 1170-b (see 1953 Report of N.Y. Law Revision Commission, pp. 463-480; New York Legis. Doc. [1953] No. 65[K]).

Said the Law Revision Commission in recommending this enactment:

> "A wife who has obtained in New York a separation order with maintenance provisions may enforce these provisions against her husband even though he may subsequently have obtained an ex parte foreign divorce entitled to recognition under the Full Faith and Credit Clause of the Constitution of the United States. (*Estin* v. *Estin*, 334 U. S. 541, 68 Sup. Ct. 1213, 92 L. Ed. 1561 (1948). The husband's divorce must be recognized as altering the marital status of the parties under the second *Williams* case (*Williams* v. *North Carolina*, 325 U.S. 226, 65 Sup. Ct. 1118, 89 L. Ed. 1577 (1942), but since the New York law was interpreted to permit a [fol. 697] maintenance order in a separation action to survive a divorce, the prior maintenance order still prevails as far as the economic relations of the parties are concerned.
>
> "The *Estin* case called attention to the injustice to a New York wife whose husband has obtained a divorce in another state in an *ex parte* proceeding. Unless she had been able to get a separation order with maintenance prior to the foreign divorce, she has no remedy. Under the Civil Practice Act maintenance of the wife may be granted only as an incident to relief in a

matrimonial action. Since 1883 it has been accepted law, moreover, that there is no inherent power in the Supreme Court to grant maintenance to a wife independent of statutory authority. Ramsden v. Ramsden, 91 N. Y. 281 (1883)." (p. 467)

The statute is no more than a legislative extension of the judicial concept that a divorce based on constructive service is divisible. Under the reasoning in the *Estin* case the state may provide for the enforcement of what are *in personam* financial obligations of the divorced husband. These obligations are deemed to survive constructive service divorce.* Anomalous though it may seem, it is no longer true that a divorce based on constructive service alone sunders in all aspects the marriage relation. It does so only for the very limited purpose of severing the marital status in [fol. 698] the narrowest sense. While the *Estin* case turned on a surviving separation judgment, referred to in that case as a vested property interest, such a judgment merely declares and makes amenable to judicial enforcement a continuing economic obligation derived, but now severable, from the marital status.

Accordingly, the statute is valid for the reasons set forth. Nor is it necessary to the analysis to consider whether the statute may, as a matter of power, apply only to a wife who has had a prior matrimonial domicile in the state. The fact is that *since* she is only "divisibly divorced" she is also "divisibly married." She is married, and, if wronged, may move the marital domicile with her, for purposes of enforcing the husband's surviving *in personam* obligations to support and maintain her. An entirely different question might be presented if the Nevada divorce had been rendered before the wife took residence in New York. As a wronged wife, still undivorced, she brought the matri-

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* Obviously, as was intended, the statute, with all its implications, applies to a New York constructive service divorce. (See 1953 Report of the Law Revision Commission, *supra.*) Moreover, a distinction between such New York divorces and foreign divorces would invite grave constitutional objection. (See *Estin* v. *Estin*, *supra.*)

monial domicile with her, even if it be only constructive matrimonial domicile. This is so despite the fact that more time was required to elapse before she could qualify to bring a matrimonial action. Put another way, in June 1953, she was divorced in Nevada by virtue of constructive service alone while a wife resident in New York. New York's law, not California's, therefore, must be examined to determine her marital status, whether "unitary" or "divisible."

Given the validity of the statute, we may turn now to its applicability to this case. The husband contends that the statute, apart from legislative power, and as a matter of interpretation, necessarily implies that there must have been a matrimonial domicile in New York before relief may [fol. 699] be obtained under it. There is nothing in the language of the statute to require it. Moreover, there had been proposed legislation which would have made such a requirement, but it was never adopted (1948: Sen. Int. No. 2366, Pr. No. 2611). There are many good reasons which may be suggested for omitting such a requirement. But that policy question is for the Legislature and not the courts to decide. It suffices that the legislative power exists, once the concept of "divisible divorce" is accepted, and there is nothing to sustain the suggested narrower interpretation.

It is also argued that the wife in this case is not a "New York wife" and that the statute was designed only to assist a "New York wife." But, again, given the concept of "divisible divorce," she is a wife—still—for the purpose of obtaining enforcement of the husband's in *personam* financial obligations. The wife in this case is in New York and has been for the required one year. It is important too that she came here still undivorced.* Thus the statutory requirements for standing to sue are satisfied. But, all this does

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* If she had come to New York already divorced, it might be necessary to consider whether under the law of California, the state of the last actual marital domicile, any economic marital obligation survived the out-of-state constructive service divorce, and if so, what effect should be given in New York to such survival.

not mean that our remedies should be available to migrant spouses for the purposes of lawsuits, indiscriminately.

The phrase "as justice may require," like similar language in section 1170-a of the Civil Practice Act, is designed not to create a right as of course. Rather, these words confer power and obligation upon a court of jurisdiction to render directions that serve the public policy of the state and protect its residents in proper cases. It may [fol. 700] not be perverted to make of New York a center for migrant wives to litigate matrimonial issues that belong or may be barred elsewhere. In such cases our courts would refuse to grant relief under the rubric in the statute "as justice may require."

In applying the statutory standard, a distinction should be made between an actual matrimonial domicile, established by intent of persons living together in permanent residence, and a construction marital domicile, which arises when a wronged wife is entitled to establish the marital domicile wheresoever she will. In any matrimonial action the wife, of course, will have to establish a matrimonial domicile of the one kind or the other. That proposition is, therefore, equally true with respect to assertion of a right to relief under this statute. Where there has been an actual matrimonial domicile in New York, it is easier to satisfy the statute. If there is no actual matrimonial domicile in New York, then it will be incumbent upon the wife to establish other equally significant circumstances before she merits relief under the statute. In this case there was no actual matrimonial domicile in New York, but there are other circumstances which suggest that discretion may be exercised in the wife's behalf.

The husband in this case is a man of many residences, temporary and permanent. His wealth and occupation give him the opportunity, open to very few, to select any one of several domiciles. This makes tenuous the relationship that this couple had to any particular domicile or residence during the four years of their marriage. Moreover, the couple frequently sojourned at the maternal home in New York City. In fact, there were particular rooms in his [fol. 701] mother's home that were repeatedly used by the couple when in New York. The bulk of the husband's

sources of income has a situs in New York. The wife, on the other hand, is supposedly destitute and is receiving welfare assistance through the City of New York. There is enough in the record from which to infer that in this matrimonial litigation, now in its fourth or fifth action or proceeding, the husband's legal headquarters are in New York. Very telling is the fact that during the marriage, according to the wife's uncontradicted testimony, she received a monthly $1,300 check from the husband's mother, in New York, for the maintenance of the household. These circumstances spell out a nexus with New York. They also negate exclusiveness of residential relation between the married couple and, say, California, or even Nevada.

Indeed, as one views the facts in this case, it is seen that the husband's ties with New York are great. His family roots and family wealth are here. It is from New York, while they lived in marriage, that the couple obtained their basic income and support. The husband's domicile may vary, but the economic and family tie to New York is persistent. It is here that his wife may alone have effective remedy against his assets. It was not unnatural or sinister for her to come here. For the purpose of enforcing the husband's economic obligation there is interest and jurisdiction in New York enough—the more so now that the wife is a public charge in this state. Accordingly, the wife, in addition to having established residence here before the divorce, and the constructive matrimonial domicile, has also sufficiently established contacts with New York to merit relief under section 1170-b.

[fol. 702] The husband makes the point that Special Term did not make a finding that he was a wrongdoer. Clearly, before maintenance may be ordered under section 1170-b, a wife must establish all the elements of one of the standard matrimonial causes of action. The difference is that she is not barred from relief by a divorce decree obtained on constructive service. The wife testified at length and was cross-examined about acts of cruelty—mental and physical—committed by the husband, and that, in September, 1952, he abandoned her. Special Term in its opinion found that the husband failed and refused to support the wife, and returned to the state of Nevada for the purpose of reestab-

fishing his domicile and instituting a divorce action against the wife. If added findings with respect to the issue of cruelty are necessary there is sufficient in the record to permit such addition, and it may be effected in the settlement of the order herein.

On the wife's appeal from the finding that the Nevada divorce was valid, there is little substance. Defendant husband supplied ample evidence that he had resumed his domicile in Nevada. This was a case of a man resuming a domicile that he had had for a number of purposes for twenty years before his marriage to this plaintiff. What motivates a man's change in domicile is not important, once it becomes clear that he in fact has effected the change.

On the issue of the husband's special appearance in the action, it is quite evident that he interceded in the action to contest by cross-examination some of the substantive issues on the merits. But the language of section 237-a of the Civil Practice Act, enacted in 1951, allows precisely that, once Special Term had overruled his objection with [fol. 703] leave to raise the defense in his answer. By virtue of the statute he had the opportunity to defend on the merits without jeopardizing his position to raise on appeal the jurisdictional issues tendered. Even though he fail to sustain on appeal his attack on the court's jurisdiction over his person, he is not subject to an *in personam* judgment.* In recommending enactment of the new section 237-a the Judicial Council evidently did not contemplate that effect nor, apparently, did it contemplate the situation that has arisen in this case. (See 16th Annual Report of the N.Y. Judicial Council (1950), p. 185 et seq; 17th Annual Report of the N.Y. Judicial Council (1951), pp. 58-64.) It would seem, however, the fairer practice to permit parties to rely on the language of the statute as it now appears, and if there is to be any limiting of the effect of the wording of the statute it should be done legislatively.

With regard to the allowance made for maintenance and for counsel fees, they are deemed adequate and justified by the record.

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* What the situation would be in a truly *in rem* action it is not proper or necessary to determine in this case.

Accordingly, the judgment should be affirmed in all respects, with costs to plaintiff. Settle order.

Bastow, Cox and Bergan, *J.J.*, concur.

Peck, *P.J.*, dissents in a dissenting opinion.

[fol. 704] Supreme Court—Appellate Division
First Department. October, 1955

David W. Peck, P.J., Charles D. Breitel, Earle C. Bastow, Joseph A. Cox, Francis Bergan, J.J.

9419

9420

Patricia W. Vanderbilt, Plaintiff-Respondent,

vs.

Cornelius Vanderbilt, Jr., Defendant-Appellant,

and

Thomas F. McCoy, Receiver and Sequestrator-Respondent.

Dissenting Opinion of Peck, *P.J.*

Peck, *P. J.* (dissenting):

I am unable to concur with the majority of the court as to the constitutionality of Section 1170-b of the Civil Practice Act. As I read the decision of the Supreme Court in *Estin* v. *Estin*, 334 U.S. 541, it turned upon the existence of previously established property rights under a New York [fols. 705-706] judgment. The court held that the Nevada decree did not wipe out the wife's claim for alimony under the New York judgment. It does not follow that the state of the wife's domicile may, subsequent to a valid divorce obtained by the husband in another state, create new alimony rights upon some theory of retaining a continuing and surviving legal or economic interest in the wife's status or support.

Also, I am unable to see how Section 1170-b would be made applicable to cases where the divorce was granted in the State of New York. If it is not so applicable, it is discriminatory and violative of the constitutional provision respecting the equal protection of the law.

I therefore dissent and vote to strike from the judgment those provisions which are bottomed upon Section 1170-b of the Civil Practice Act.

[fol. 707] State of New York, Court of Appeals

No. 39

Patricia W. Vanderbilt, Respondent-Appellant

vs.

Cornelius Vanderbilt, Jr., Appellant-Respondent

and

Thomas F. McCoy, Receiver and Sequestrator-Respondent

Opinion of the Court of Appeals—Decided May 31, 1956

Desmond, *J.*:

The principal question is as to the validity and applicability of this provision of section 1170-b of our Civil Practice Act, enacted in 1953:

> "In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife."

[fol. 708] In 1948 plaintiff, then domiciled in Nevada, and defendant, then domiciled in California, married in Con-

necticut and together established in California a domicile which continued (despite much travel in this country and Europe) till they separated in September, 1952. After the separation the wife immediately went to New York City. In October, 1952, she sued in New York for a separation but that suit was dismissed because of the one-year residence requirement of subdivision 3 of section 1165-a of the Civil Practice Act. After a visit to California, plaintiff returned to New York in February, 1953, and has since resided in this State. In March, 1953, defendant husband brought in Nevada a suit for divorce, process in which was served on the wife in New York. The wife did not appear or answer in that suit which in June, 1953, produced a divorce decree in favor of the husband. In April, 1954, plaintiff, effecting service through publication of the summons and sequestration of his assets (see Civ. Prac. Act, § 1171-a) in New York, commenced this action in the Supreme Court, New York County, praying for a separation on the ground of cruelty and abandonment, and for an award of alimony (there were no children of the marriage). Defendant, appearing specially, moved to vacate the sequestration and to dismiss this action on the ground that the marriage no longer existed, and that there was in New York State no matrimonial domicile or status, or domicile of plaintiff. That motion of defendant was heard and dismissed before trial but defendant availed himself of the permission then given him to plead in his answer the alleged lack of jurisdiction over his person and over the subject matter of the cause. His answer in this suit, besides denying all the complaint's allegations of cruelty and abandonment, contained also a purported complete defense in which he called the court's attention to the Nevada divorce judgment and asserted that "full faith and credit" therefor was, under the Federal Constitution, a bar to the maintenance of this [fol. 709] action. We agree with defendant that he has not, by his subsequent activities in the case, waived the contentions he is still making, as to lack of personal jurisdiction (see Civ. Prac. Act, § 237-a, subds. 3[c], 4). We construe the judgment below not as one in personam against defendant but as fixing the amount of the alimony and directing its payment out of the sequestered property.

When this action came to trial, plaintiff went forward with testimony as to the alleged acts of cruelty and abandonment. Defendant did not take the stand and called no witnesses to deny that testimony. Plaintiff attempted also to establish factually that defendant's previously obtained Nevada divorce was invalid because, she urged, defendant did not have a bona fide domicile in that State (*Williams* v. *North Carolina*, 325 U. S. 226). We can dispose of that latter issue right now by holding that there was sufficient evidence to justify the finding made by both courts below in this cause that defendant did have a good faith domicile in Nevada for a sufficient period before his divorce decree was handed down. That proof included a showing that defendant had lived and voted and owned property in Nevada for many years before his marriage to plaintiff, that plaintiff and defendant lived there together in the early months of their marriage, that defendant returned there some months before the divorce and that defendant has continuously maintained a residence in Nevada since the divorce. The various contradictory statements shown to have been made by defendant on this subject did no more than set up a question of fact as to the good faith of the Nevada pre-divorce domicile, an issue of fact which has been conclusively settled in favor of defendant by the courts below.

After both sides had put in proof, defendant renewed his motion, previously made at the end of plaintiff's case, to dismiss the complaint on the grounds of lack of juris- [fol. 710] diction and of the alleged binding effect of the prior divorce. The trial court, holding that the Nevada divorce was binding in New York to the extent of dissolving the marriage, dismissed so much of the complaint as asked for a judgment of separation but (on the authority of Civ. Prac. Act, § 1170-b, *supra*) continued to entertain so much of the action as prayed for support and maintenance. Defendant objected to this on the jurisdictional grounds already described, also on the grounds that the Nevada judgment had terminated the marriage and all its obligations, that section 1170-b is unconstitutionally vague and lacking in standards as to what "justice may require", that section 1170-b if so applied would violate not only New York com-

mon law but the Full Faith and Credit requirement of the Federal Constitution, and that plaintiff had not been a resident of New York State for the one-year period required by subdivision 3 of section 1165-a of the Civil Practice Act, nor for any other period. The courts again denied defendant's dismissal motion.

The trial court then took the proofs offered by plaintiff as to amounts suitable and necessary for her support. The trial came to an end after a renewal and another denial of defendant's dismissal motions. Later, the court awarded plaintiff $250 per week for support plus an award of $3,500 for counsel fees and expenses (her counsel had previously been awarded and paid $2,500 for such fees and expenses). The support money was directed to be paid from June 8, 1954, the date of the commencement of this action. Defendant's brief argues against the amount of this award and as to its retroactivity, but these determinations in those respects were, on this record well within the discretion of the trial court, affirmed by the Appellate Division. The same answer goes to so much of plaintiff's cross appeal as disputes the adequacy of the support allowance.

We come, then, to the remaining, and principal, questions of law:

[fol. 711] Does this case come within the language and intent of section 1170-b of the Civil Practice Act?

2. If the answer to the first question is "yes", is section 1170-b, so applied, invalid as violative of the Federal Constitution, or otherwise?

There should be no doubt as to the applicability hereto of section 1170-b. This is certainly an action for separation, where the court refused "to grant such relief by reason of a finding by the court that a divorce * * * had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained". Plaintiff, having resided in this State for the required one-year period, had standing to bring such a suit and jurisdiction was effected by the sequestration of defendant's New York assets. There is nothing in the statute's language to suggest that it was intended to apply only to marriages where the parties had lived together in this State as their

matrimonial domicile. Presumably, the Legislature was moved to action by the clear and cogent reasoning of a report made to the Legislature by the Law Revision Commission (1953 Report of N. Y. Law Revision Commission, pp. 463-480). The report (p. 467) cited *Estin* v. *Estin* (296 N. Y. 308, aff'd 334 U. S. 541) as holding that "A wife who has obtained in New York a separation order with maintenance provisions may enforce these provisions against her husband even though he may subsequently have obtained an *ex parte* divorce entitled to recognition under the Full Faith and Credit Clause of the Constitution of the United States". But, the Commission pointed out (as had one of the Supreme Court opinions in *Estin*) that there was no *procedure* available in New York State whereby similar protection of her rights to support could be had by a wife unless she, prior to the foreign divorce, had obtained an alimony order in a separation suit, as had Mrs. Estin. The procedural difficulty in this State was, of course, that [fol. 712] our courts have no power without statutory authority to grant maintenance to a wife and (before section 1170-b was passed) there was no statutory authority to award such alimony except as incidental to a matrimonial action (*Ramsden* v. *Ramsden*, 91 N.Y. 281; *Erkenbrach* v. *Erkenbrach*, 96 N.Y. 456; *Johnson* v. *Johnson*, 206 N.Y. 561; *Weintraub* v. *Weintraub*, 302 N. Y. 104; Civ. Prac. Act, § 1170). Recognizing that the doctrine of "divisible divorce" had been firmly established in law (*Estin* v. *Estin*, *supra*; *Lynn* v. *Lynn*, 302 N. Y. 193, certiorari denied 342 U. S. 829), the Law Revision Commission and the Legislature set out to remove the procedural bar against a wife's obtaining in the New York courts protection of those rights to support which remained to her after and despite a foreign divorce, even though that foreign divorce had effectively terminated her marriage. Therefore, the purpose, language and effect of section 1170-b support the judgment granted plaintiff in this case. What other and different situations the statute may properly be applied to, we need not and should not now specify.

The second question of law is as to the validity of the statute itself. Defendant's argument against validity boils down to an assertion that the *Estin* holding (*supra*) applies

to the particular *Estin* fact pattern only. Defendant says that the court in *Estin* was dealing with a prior New York separation-alimony judgment and a later Nevada marriage-status-termination judgment, and giving effect to both those judgments. Such is not, of course, the situation here. But the situation here is in its material elements just the same as in *Armstrong* v. *Armstrong* (350 U. S. 568) where all the Justices seem to have agreed that a State may validly grant alimony after and in spite of a foreign ex parte divorce. (See also, *May* v. *Anderson*, 345 U. S. 528, as to custody of children.) We must look to the rationale, not the special facts, of *Estin* and *Armstrong* and we find that rationale to be the same as was expressed in our [fol. 713] *Lynn* v. *Lynn* opinion (302 N. Y., 193, 200-201, supra) thus: "* * * a divorce decree may be completely effective to dissolve a marriage and yet completely ineffectual to alter certain legal and economic incidents of that marriage" (see *Hopson* v. *Hopson*, 221 F. 2d 839). Mrs. Estin, fortunately for her, had gotten her support rights defined and adjudicated by a New York judgment before her husband went off for his foreign divorce. Section 1170-b now makes it possible for a wife to get such an adjudication after the foreign-State divorce. Until *Williams* v. *North Carolina* (325 U. S. 226, *supra*) made effective in this State ex parte divorces like that gotten by this defendant, such divorces had no effect here as to either marriage status or property rights. Then came *Williams* v. *North Carolina*, and New York had to give effect to such decrees as terminating marriages. But in the background was *Pennoyer* v. *Neff* (95 U. S. 714 and its ancient and undisturbed rule that personal service within the State where suit is brought (or waiver of such service) is required for due process of law to support a personal judgment. So, that part of a foreign (non-personal service but otherwise jurisdictionally valid) divorce decree which dealt with status had to be given effect in New York as terminating the marriage but was entitled to no effect at all so far as support or other property rights were concerned. The question is not whether the economic liabilities of a marriage can validly be held to survive a valid divorce. The point is that the

divorce obtained by defendant was valid as to status only, but not as to property. The holding that such a divorce judgment was not effective as to property meant necessarily that the one who obtained it could claim no protection from it as to property. Defendant would have us say that the power to preserve, unimpaired by a foreign non-personal divorce, the liability of a husband to support his wife, is a power of that State only which has "jurisdiction of the marriage". We find no such strict limitation. True, New [fol. 714] York never had jurisdiction of this marriage res in the sense that New York was the parties' domicile while they lived together. But when the husband, abandoning his wife, left their California domicile to establish a Nevada domicile for his own purposes, the abandoned wife had a right to set up a New York domicile for herself and bring the matrimonial domicile to New York with her (*Hunt v. Hunt*, 72 N. Y. 217, 242, 243; Dean v. Dean, 241 N. Y. 240, 244; *Matter of Daggett*, 255 N. Y. 243, 247). That right she exercised in this instance before the Nevada judgment was entered and she satisfied New York's residence requirements before suing for a separation (Civ. Prac. Act, § 1165-a). We need not decide whether she would have the same right to come into New York even after a foreign-State divorce, to take advantage of section 1170-b.

We will now consider briefly several other arguments advanced by defendant. He says that his Nevada judgment has been denied the "full faith and credit" the Federal Constitution (Art. IV, § 1) demands for it. But that assertion involves two erroneous assumptions and either of those errors destroys the alleged constitutional point. Defendant assumes that New York would not enforce its section 1170-b as against a prior non-personal New York divorce judgment, and then goes on to assume that New York's supposititious refusal to apply section 1170-b as against one of its own New York judgments would mean that New York would be giving a foreign judgment less protection than a local judgment as against section 1170-b. As to defendant's first assumption, there is nothing in our statute to support the conclusion that it is inapplicable where the prior judgment was obtained in New York (the Law Revision Commission report and recommendation certainly make no such

distinction, but instead recommends applicability "whether the husband's *ex parte* adjudication of marital status was obtained in a foreign court or a New York court" Pg. 468. Actually, the basis for this assumption by defendant is an [fol. 715] idea which pervades defendant's whole argument —that is, that it is fundamental and unchangeable New York law that an already divorced wife may never be awarded maintenance by a New York court and that an action for separation or divorce in New York presupposes an existing valid marriage (see *Bannon* v. *Bannon*, 270 N.Y. 484, 488). But section 1170-b, to the extent that it applies, has changed that old New York policy. We can go ever farther, however, and declare that even if section 1170-b was unavailable as against a New York divorce, that circumstance would not mean that the New York judgment was getting more, and the Nevada judgment less, faith and credit in New York. Nevada's judgments put in evidence in New York are entitled to the same effect as they are given in Nevada, and, to avoid unconstitutional discrimination (U. S. Const., Art. IV, § 2), the same effect New York's own similar judgments are given in New York. But under the "divisible divorce" doctrine, defendant's Nevada divorce had no effect (any more than it said anything in terms) as to plaintiff's property rights. Its sole effect was to end a marriage and it has been given that effect in New York.

Defendant brands as error the making by the Appellate Division, in its order and in its judment, of a new finding of fact that defendant had violently assaulted plaintiff and had been guilty of other cruel treatment of plaintiff which endangered and injured her health. Since the record justifies that finding, the Appellate Division had the power to make it, although the trial court had not done so (see *Bernardine* v. *City of New York*, 294 N. Y. 361, 366). As to that finding being contrary to the Nevada court's earlier determination that defendant was entitled to a divorce because of plaintiff's "Extreme Cruelty", it is settled that the Nevada finding in an in rem proceeding while conclusive as to the marriage status being dissolved, does not bind plaintiff personally nor is it conclusive as to any fact upon which the Nevada judgment is based. [fol. 716] (*Durant* v. *Abenroth*, 97 N.Y. 132, 141; Matter of

Holmes, 291 N. Y. 264, 270, citing restatement, judgments § 74).

Other charges by defendant of deprivation of due process are without merit. He complains that he was denied a fair opportunity to present proof as to alimony but the record does not bear him out. He complains as to the vagueness of the phrase in section 1170-b "as justice may require". But that same phrase has been for many years in section 1170 of the Civil Practice Act with respect to questions of custody of children and temporary and permanent alimony in separation and divorce suits. It means (see as used in Election Law, § 330) that there are no "as matter of law" requirements one way or the other as to those matters which are to be dealt with in the discretion of the courts, on all the facts. Similarly without substance is defendant's statement that he was given no notice by pleadings or otherwise, in this suit brought ostensibly for a separation, that even if no separation were to be granted, an award for maintenance might still be in the offing. Adequate notice was given by the statute itself which warned that if a separation should be refused because of the foreign divorce judgment, maintenance might still be awarded.

The judgment should be affirmed with costs to plaintiff.

[fol. 717] DISSENTING OPINION

STATE OF NEW YORK COURT OF APPEALS

No. 39

PATRICIA W. VANDERBILT, Respondent-Appellant

vs.

CORNELIUS VANDERBILT, JR., Appellant-Respondent

and

THOMAS F. McCOY, Receiver and Sequestrator-Respondent

FULD, *J.*: (*dissenting*)

In my opinion, section 1170-b of the Civil Practice Act as here construed and applied offends against the full faith and credit clause of the Federal Constitution, and neither

Estin v. *Estin* (334 U.S. 541, affirming 296 N.Y. 308), nor (*Armstrong* v. *Armstrong*, 350 U.S. 568), supports a contrary conclusion.

It is settled in this state that the duty of support flows from the marital status. And, before the enactment of section 1170-b in 1953, when that status terminated, so too did the duty of support, except insofar as provision for continued support may have been made in the judgment dissolving the marriage. "Such a claim in itself furnishes no foundation for a cause of action; it is a mere incident of [fol. 718] the judgment in a matrimonial action." (*Querze* v. *Querze*, 290 N.Y. 13, 18; see *Weintraub* v. *Weintraub*, 302 N.Y. 104, 108.)

There is no doubt that the marriage between plaintiff wife and defendant husband was effectually terminated by the Nevada divorce decree which defendant procured in June of 1953. Although the wife was not subject to the personal jurisdiction of the Nevada court, that tribunal was unquestionably empowered to adjudicate the termination of the marriage at the suit of the husband who was domiciled in that state. (See *Estin* v. *Estin*, *supra*, 334 U.S. 541, 544; *Williams* v. *North Carolina*, 317 U.S. 287.) And examination of the decree then rendered demonstrates that it also provided for the termination of defendant's duty to support plaintiff. In so many words, it recited that the marriage between the parties was "dissolved absolutely and forever and *they hereby are freed and released from the bonds of matrimony and all the duties and obligations thereof*". Under Nevada's decisional law, it seems clear that, in the absence of a provision either awarding alimony to the wife or reserving jurisdiction to do so, "there can be no grant of alimony after such a divorce." (*Sweeney* v. *Sweeney*, 42 Nev. 431, 438-439; see *Lynn* v. *Lynn*, 302 N.Y. 193, 203, cert. den. 342 U.S. 849.) That being so, it follows that the decree granted to defendant by the Nevada court must be taken as having cut off plaintiff wife's right to alimony. (See *Lynn* v. *Lynn*, *supra*, 302 N.Y. 193, 203-204.)

A different case would have been presented if, prior to the termination of the marriage by the Nevada divorce decree, the New York courts had adjudicated with respect

to defendant's duty of support and had rendered a judgment against him directing payment of such support. The wife's property right in the judgment would then have assumed a status independent of the continuance of the [fol. 719] marital relationship, and the subsequent dissolution of the marriage by divorce would have been ineffectual in and of itself to deprive the wife of that property right—*unless* the divorcing court had acquired personal jurisdiction over the wife and had adjudicated with respect to her rights in the support judgment. That was the extent of the decision in *Estin* v. *Estin* (*supra*, 334 U.S. 541, affg. 296 N.Y. 308; see, also, *Lynn* v. *Lynn*, *supra*, 302 N.Y. 193, 202). Emphasizing that New York had "evinced a concern with this broken marriage when both parties were domiciled in New York and before Nevada had any concern with it" (334 U.S., at p. 547), the Supreme Court stressed as dominant the existence of the New York judgment (334 U.S., particularly pp. 548-549; also, dissent of FRANKFURTER, *J.*, pp. 549-550) and treated it as "a property interest" with a separate status of its own (334 U.S., at p. 548):

> "The New York judgment is a property interest of respondent, created by New York in a proceeding in which both parties were present. It imposed obligations on petitioner and granted rights to respondent. The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations."

In 1953, however, the statute now under consideration, section 1170-b of the Civil Practice Act, was passed to empower our courts to award alimony to a wife, against whom the husband had procured a valid *ex parte* divorce, even though she had not previously obtained a judgment or order for support. (See 1953 Report of N.Y. Law Rev. Comm. [N. Y. Legis. Doc., 1953 No. 65 (K)], pp. 463-480; The Commission and The Courts, 40 Cornell L.Q. 646, 656.) But that did not mean that the courts of this state would be authorized under all circumstances to award the wife such

[fol. 720] alimony. If, for instance, the court of the other jurisdiction granting the divorce had actually decided to terminate the husband's duty of support and deny alimony to the wife, then the Federal Constitution would compel our courts to accord to that portion of the judgment, as well as to the part terminating the parties' marital status, full faith and credit and deny the wife's application for maintenance under the 1953 statute.

In other words, section 1170-b may be applied validly, that is, consistently with the dictates of the full faith and credit clause, only where the earlier *ex parte* judgment of divorce "did not purport to adjudicate the absent wife's right to alimony." (*Armstrong* v. *Armstrong*, *supra*, 350 U.S. 568, 569.) In such a case, to quote from *Armstrong*, the courts of the second state (Ohio), "in awarding alimony to the wife, did not in fact fail to give full faith and credit to the Florida decree" (350 U.S., at p. 569.) However, in so deciding, as Mr. Justice MINTON observed for the majority (p. 569), the court did not reach the question whether the courts of the second state may disregard the determination in the prior divorce action that the wife was not entitled to support.

In such a case as the present, where the earlier Nevada decree in effect denied alimony to the wife (see, *supra*, pp. 354-355),[1] section 1170-b may be constitutionally invoked only on the theory that Nevada, while having jurisdiction to adjudicate the termination of the marital relationship, lacked the power, as a matter of due process, to adjudicate the concomitant termination of incidents of that relationship, which have no independnt status of their own. To that I cannot subscribe. Any such arbitrary differentia- [fol. 721] tion, between the marriage status and its inseparable incidents, not only does violence to basic principles of logic, but flies in the face of the constitutional requirement

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[1] As noted above, the Nevada decree here involved did in terms free and release the husband from "all the duties and obligations" flowing from the marital relationship, and that terminated the wife's right to support. (See *Sweeney* v. *Sweeney*, *supra*, 42 Nev. 431, 438-439; *Lynn* v. *Lynn*, *supra*, 302 N. Y. 193, 203.)

that the Nevada judgment be given *full* faith and credit. (Cf. *Estin* v. *Estin*, *supra*, 334 U. S. 541 554, *per* JACKSON, *J.*, dissenting.)

The deceptive appeal of the phrase "divisible divorce" should not be permitted to obscure the basic concepts involved. A finding of divisibility may be appropriate where, as in *Estin*, the particular right at issue is a distinct property right, embodied in a previously granted judgment, which is no longer dependent, for its recognition or enforcement, upon the marital relationship, or where, as in *Armstrong*, the court rendering the divorce has itself severed the issue of support and left it subject to separate adjudication in the future. The situation is, however, decidedly different where, as in the case before us, the claim asserted depends for its very existence on the continuance of the marital status and that status and its incidents have both been terminated by a jurisdictionally valid judgment of divorce.

I find myself unable to agree with the contrary views expressed by the minority of the Supreme Court, through Mr. Justice Black, in the *Armstrong* case (*supra*, 350 U. S. 568, 575, et seq.), to the effect that the court rendering the *ex parte* divorce has no jurisdiction to pass upon the question of alimony. Justice Black reached that conclusion on the assumption that the denial of alimony constituted the rendition of "a personal judgment" against the wife "depriving her of all right to alimony." I cannot accept that reasoning, for it seems to me to rest on the erroneous premise that a mere incident of the marital status, which "in itself furnishes no foundation for a cause of action" (*Querze* v. *Querze*, *supra*, 290 N. Y. 13, 18), is the equivalent of an independent right.

[fol 722] In any event, however, the present case would seem to fall outside of the underlying policy of section 1170-b. At the time the Nevada judgment of divorce was rendered, plaintiff wife had no standing in New York to maintain the present action for separation and, by that token, had no enforceable right to invoke the benefits of the section. Where the husband is not a resident of this state and the parties were not married here, the wife does not have standing to maintain an action for separation *unless*

she has been a resident of the state "for at least one year continuously at any time prior to the commencement of the action" (Civ. Prac. Act, § 1165-a). Plaintiff first selected this state as her place of continuous residence in February, 1953, only one month before defendant instituted suit in Nevada and but four months before the divorce decree was granted by that state.

Section 1170-b authorizes an award of support "as justice may require," and the legislative design is thus made clear that any award must be consistent with the public policy of the state. Obviously, the legislative purpose was to deal with broken marriages with which New York was directly concerned. (See *Estin* v. *Estin*, *supra*, 334 U. S. 541, 549.) In order not to pervert that aim, the grant of relief should be restricted to a case where there is a substantial *nexus* between the particular marriage and this state. To read the statute as opening the door to wives from other states who take up residence in this state solely for the purpose of invoking section 1170-b, *after* the rendition of an *ex parte* judgment of divorce in another state, or on the eve of judgment or the institution of the divorce action, not only goes far beyond the legislative purpose, but also serves to flout the principle underlying the full faith and credit clause.

Only by confining the statute to the situation where the wife had standing to institute the matrimonial action in this [fols. 723-724] state at the time that the foreign divorce was granted, may New York's dealings with such a broken marriage be restricted "to the matters of her dominant concern" (*Estin* v. *Estin*, *supra*, 334 U. S., at p. 549) and unseemly conflicts between this state and other jurisdictions avoided.

The complaint should have been dismissed. Accordingly, the judgment should be modified by deleting all but the first adjudging paragraph thereof, and, as so modified, affirmed, with costs in all courts.

CONWAY, *Ch. J.*, FROESSEL, VAN VOORHIS, and BURKE, *JJ.*, concur with DESMOND, *J.*; FULD, *J.*, dissents in an opinion in which DYE, *J.*, concurs.

Judgment affirmed.

[fol. 725] COURT OF APPEALS

No. 39

WITNESS:

The HON. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

No. 39

PATRICIA W. VANDERBILT, Respondent-Appellant

vs.

CORNELIUS VANDERBILT, JR., Appellant-Respondent

and

THOMAS F. McCOY, Receiver and Sequestrator-Respondent

REMITTITUR—May 31, 1956

[fol. 726] BE IT REMEMBERED, That on the 2nd day of February in the year of our Lord one thousand nine hundred and fifty-six, Cornelius Vanderbilt, Jr., the appellant-respondent, and Patricia W. Vanderbilt, the respondent-appellant in this cause, came here unto the Court of Appeals, by Sol A. Rosenblatt, and Monroe J. Winsten, their respective attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Thomas F. McCoy, receiver and sequestrator-respondent, in said cause, afterwards appeared in said Court of Appeals by Jeremiah M. Evarts, his attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Sol A. Rosenblatt, of counsel for the appellant-respondent, and by Mr. Monroe J. Winsten, of counsel for the respondent-appellant, no appearance for Thomas F. McCoy, receiver and sequestrator-respondent, and after due deliberation had thereon, did order and ad-

judge that the jugment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs to plaintiff.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs &c, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said [fol. 727] Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, May 31, 1956.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

STATE OF NEW YORK,
Court of Appeals:

Raymond J. Cannon, Clerk.

[fol. 728] Supreme Court of the State of New York,
County of New York

Patricia W. Vanderbilt, Plaintiff

against

Cornelius Vanderbilt, Jr., Defendant

Judgment of Supreme Court, New York County, Entered June 8, 1956 on Judgment of the Court of Appeals

The above mentioned defendant having appealed to the Court of Appeals from so much of the order of the Appellate Division of the Supreme Court, First Judicial Department, dated December 20th, 1955, and entered in the office of the Clerk of said Court on December 29th, 1955, and from so much of the judgment entered thereon with costs in the office of the Clerk of the County of New York on December 30th, 1955, as affirms with costs that part of the judgment entered in the above entitled action in the office of the Clerk of the County of New York on March 31, 1955, which awards plaintiff maintenance and counsel fees and which directs the payment of the amount thereof by the defendant and by the Receiver and Sequestrator in this action, and which awards plaintiff judgment for costs against the defendant in the sum of $375.30 and which di-
[fol. 729] rects the payment of the amount thereof by the said Receiver and Sequestrator and which may permit continued retention, collection and payment out by said Receiver and Sequestrator of defendant's funds, money, property and other assets, as is stated in his notice of appeal; and plaintiff having appealed to the Court of Appeals from so much of said order of the Appellate Division of the Supreme Court, First Judicial Department, and from so much of said judgment entered thereon in the office of the Clerk of the County of New York as affirms that part of the said judgment entered in the above entitled action in the office of the Clerk of the County of New York on March 31, 1955, which adjudges that the Nevada divorce decree in favor of the defendant is a bar to plaintiff's cause of action for a separation, and which denies to the plaintiff a separation and dismisses that part

of the plaintiff's complaint relating to the relief of separation, and which fails to adjudge that jurisdiction of the person of the defendant was acquired in this action and which excludes from said judgment the sixth decretal provision of the plaintiff's proposed judgment, as is stated in her notice of appeal, and the Court of Appeals having heard said appeals, and ordered and adjudged that the judgment so appealed from be affirmed, and judgment be entered for the plaintiff, with costs of said appeals, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of New York, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court, and directing the entry of a judgment of affirmance herein with costs of said appeals to be taxed against the defendant herein,

Now on motion of MONROE J. WINSTEN, attorney for plaintiff, it is

ADJUDGED that the judgment of the Appellate Division [fols. 730-731] of the Supreme Court, First Judicial Department entered herein in the office of the Clerk of the County of New York on the 30th day of December, 1955, be, and the same hereby is, affirmed, and that plaintiff, PATRICIA W. VANDERBILT; recover of defendant, CORNELIUS VANDERBILT, JR., the sum of $95 79/100 costs of said appeals as herein taxed, to be paid by the Receiver and Sequestrator out of the moneys, funds, property and assets which he, as such Receiver and Sequestrator, has received or may become entitled to receive as such Receiver or Sequestrator.

Date: New York, N. Y.,
June 8th, 1956.

Archibald R. Watson, Clerk.

Plaintiff's Address:

230 East 51st Street
New York, N. Y.

Defendant's Address:

First National Bank Building
Reno, Nevada.

Filed June 8, 1956, New York County Clerk's Office.

[fol. 732] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 302

CORNELIUS VANDERBILT, JR., Petitioner,

vs.

PATRICIA W. VANDERBILT and THOMAS F. McCOY, Receiver and Sequestrator

ORDER ALLOWING CERTIORARI—Filed October 8, 1956

The petition herein for a writ of certiorari to the Supreme Court of the County of New York and the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 8, 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1956

No. 302

CORNELIUS VANDERBILT, JR.,
Petitioner,

v.

PATRICIA W. VANDERBILT,

and

THOMAS F. McCOY, Receiver and Sequestrator,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK JOINTLY WITH OR IN THE ALTERNATIVE TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

SOL A. ROSENBLATT,
CHARLES RODEN,
Counsel for Petitioner.

SOL A. ROSENBLATT,
630 Fifth Avenue,
New York 20, New York,
Attorney.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1956

No.

CORNELIUS VANDERBILT, JR.,
Petitioner,

v.

PATRICIA W. VANDERBILT,

and

THOMAS F. McCOY, Receiver and Sequestrator,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK JOINTLY WITH OR IN THE ALTERNATIVE TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the final judgment of the Court of Appeals of the State of New York, the highest court of that State, entered May 31, 1956, and upon remittitur filed, the judgment entered thereon in the Supreme Court, New York County, on June 8, 1956.

Opinions Below

Court of Appeals of the State of New York, 1 N. Y. 2d, 342; *(Appendix 1, 11). Appellate Division of the Supreme Court of the State of New York, First Judicial Department, 1 App. Div. 2d, 3; (Appendix 18, 32). Supreme Court of the State of New York, County of New York (after trial), 207 Misc. 291; id. 294; (Appendix 34, 37). Supreme Court of the State of New York, County of New York (upon preliminary motion to dismiss), 133 N. Y. S. 2d, 314 (not officially reported) (Appendix 53).

Jurisdiction

The judgment of the Court of Appeals was entered on May 31, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3).

Questions for Review

1. Was full faith and credit denied the ex parte Nevada decree of divorce validly procured by petitioner against respondent, by the fact that New York Civil Practice Act, Sec. 1170-b, has been applied below to permit respondent, subsequent to such divorce: (a) to complete a one-year's jurisdictional domicile for the purpose of maintaining an ex parte separation action as a married woman against petitioner, a Nevada resident; and (b) to proceed to trial and to obtain a judgment of maintenance and counsel fees after the dismissal of her complaint for a separation adjudged to be barred by the divorce decree?

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* Appendix refers to A1 et seq. pages following this Brief.

2. Was Civil Practice Act, Sec. 1170-b, validly applied below so as to impose a new post-marital obligation upon a non-resident husband, which obligation never existed in California and Nevada, the sole States of the parties' joint matrimonial domicile, and which statute was not even enacted in New York at the time of their physical separation?

3. Is Civil Practice Act, Sec. 1170-b, discriminatory, and as applied below, has petitioner been denied equal protection of the laws by the fact that that statute actually (a) may only be applied against a husband who procures a decree of divorce in another State and not in New York; and (b) may not be applied in any New York separation action where the issue of divorce does not arise?

4. Was the petitioner denied due process of law by the following:

(a) Respondent being permitted to sequester petitioner's property upon inadequate constructive notice, where neither the summons nor the complaint commencing the action, nor the sequestration papers, in any way made any attack upon or even referred to the prior divorce decree, nor that any claim for maintenance would be made by respondent as a divorced woman.

(b) The determination of the Courts below that petitioner was guilty of such misconduct as to make it a requirement of justice that respondent be supported after divorce, although her complaint was dismissed at the close of her case by reason of the bar of the Nevada decree and petitioner never had a real opportunity to answer to those charges of misconduct.

(c) The fact that the basis for relief after divorce, under Civil Practice Act, Sec. 1170-b, rests solely upon the vague and indefinite phrase "as justice may require".

(d) The respondent being required falsely to claim she is a married woman and permitted to sue for a separation.

Constitutional and Statutory Provisions Involved

Article I, Section 10, which reads, in part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . ."

Article IV, Section 1, which reads, in part:

> "Full faith and credit shall be given in each State to the public acts, Records, and Judicial Proceedings of every other State."

Article IV, Section 2, which reads, in part:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, Section 1, which reads, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Civil Practice Act, Sections 1170-b, 1165-a(1-3), 1166, 1161 (Appendix 57).

Statement

This ex parte separation action was commenced by respondent as an alleged wife against the petitioner as the alleged husband. Defendant, appeared specially, and ob-

jected to the jurisdiction of the Court over his person and of the subject matter. After his preliminary motion to dismiss the action was denied, (Appendix 53) preserving his special appearance with the permission of the court, he answered the complaint and set up as a bar to the action, his jurisdictional objections and the ex parte decree of divorce previously procured by him against the plaintiff.

The parties were married in Connecticut in September 1948. Defendant then was domiciled in Nevada, and plaintiff then was domiciled in California. Each had been so domiciled for many years prior to the marriage. By virtue of the marriage, Nevada became the initial marital domicile of the parties, and a few months thereafter they established California as their subsequent marital domicile, which continued until their physical separation in September 1952. There is no issue of the marriage. When married, respondent was twenty-eight years of age and petitioner, fifty. She had previously been divorced once, and he, four times.

On October 1, 1952 the respondent, as plaintiff, commenced a prior separation action against petitioner, as defendant, in the Supreme Court, New York County, founded upon a complaint verified by her while still remaining in California, in which she falsely alleged the parties to be residents of New York. Plaintiff did not actually come to New York herself until December 1952, after the commencement of that prior action. She was only here a short while before returning to her domicile in California. The prior separation action was dismissed by final order of the Supreme Court, New York County, dated February 27, 1953, which adjudged that the parties were not residents of New York State as of October 1, 1952, and neither had ever resided in New York prior thereto continuously for one year (Appendix 72).

On February 12, 1953, the wife again came to New York, and allegedly has resided there ever since. Thereafter, in March 1953, the husband changed his domicile from California back to Nevada. He then procured a final ex parte decree of divorce against the respondent in the State of Nevada on June 30, 1953. While said divorce action was pending, respondent made a motion in her first separation action (then pending on her appeal, subsequently dismissed) to enjoin petitioner from proceeding with his said divorce action, and said motion was denied by order of the Supreme Court below dated July 3, 1953.

Meanwhile, on April 13, 1953, there became effective New York Civil Practice Act, Sec. 1170-b. One year later, in April 1954, respondent commenced publication of the summons herein against defendant as a non-resident. Respondent had procured an ex parte order from the Supreme Court, New York County, on April 21, 1954, sequestrating petitioner's New York property. Neither said order, nor the papers upon which it was based, made any reference to the divorce.

Defendant's objections that the proceedings violated the Federal Constitution and denied him equal protection of the laws, due process of law, the privileges and immunities to which he is entitled, and failed to give full faith and credit to said Nevada decree, were made as follows: upon his preliminary motion to dismiss the action (Appendix 53); in his answer to the complaint (fols. 101-110); during the trial (fols. 134-150, 159-160, 171-174, 863-867, 1043-1046, 1188-1190, 1196-1199, 1351-1359, 1937); and in his counsel's briefs and arguments upon every appeal.

The first decision of the trial Court dismissed the complaint by reason of the Court having found the Nevada divorce decree to be valid and entitled to full faith and credit (Appendix 34). The second decision of the trial

Court held Civil Practice Act, Section 1170-b, not to violate the Federal Constitution and awarded respondent substantial maintenance and counsel fees (Appendix 37). Petitioner then appealed to the Appellate Division of the Supreme Court. That Court affirmed with an opinion sustaining the constitutionality of Section 1170-b, the Presiding Justice dissenting in a separate opinion (Appendix 18, 32). The petitioner further appealed to the Court of Appeals. That Court affirmed the order of the Appellate Division, with an opinion. Two Judges dissented in a separate opinion (Appendix 1, 11). Plaintiff, unsuccessfully, had cross-appealed from that part of the judgment below, which was unanimously affirmed, sustaining both the validity of defendant's Nevada divorce and his objection to the court's jurisdiction of his person.

Argument

The Courts below have created widespread concern in dogmatically applying herein certain persuasive utterances of this Court which we do not believe were intended to be so applied by this Court.

When this Court tightened the strings about husbands who fled the marital domicile in order to escape their domestic responsibilities through foreign ex parte divorce, we are confident that it did not intend to loose upon the country predatory females who themselves, with perfect complacency, might abandon the marital domicile, and when separated from or divorced by their husbands, then comb the legislative counters of forty-eight States for the best bargain in support statutes.

Among the questions of law raised herein is perhaps a very controlling one as to whether by the prior decisions of this Court such as *Estin v. Estin*, 334 U. S. 541, it was

intended, as we believe, to lay down a rule that it is only when a wife has been vested with property rights by a prior support judgment of one State, that they may not subsequently be extinguished by ex parte divorce decree obtained by the husband in another State.

A minority of this Court rendering a separate opinion in *Armstrong* v. *Armstrong*, 350 U. S. 568, ; 100 L. ed. (Advance p. 465) indicated that it was not in accord with the point we make. In that case, the minority seemed to be considerably influenced by the thought that alimony is a vested property interest even before it has been awarded to a wife. This is not the law of Nevada or California, the only two States where the parties dwelled together as husband and wife. Nor is it the rule in New York, where the wife came after the physical separation of the parties[1]. (Except as it may have been qualified by the procedural enactment of Sec. 1170-b so as to apply solely in cases where a divorce is had and sustained as valid). Alimony has long been defined in New York as the transformation by judicial decree, of a general *duty* of support, into a legal *debt*[2]. It is an incident of the relationship which ordinarily terminates with the death of the husband[3].

The expectancy of alimony after the death of a marriage is no more a property right than the hope of inheritance from the estate of living next-of-kin. The right to receive support does not ripen into a vested obligation until fixed by an event in the law. (See, opinions below, A-6, 11-12, 15-16.)

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(1) *Sweeney* v. *Sweeney*, 42 Nev. 431, 438-439); *Lynn* v. *Lynn*, 302 N. Y. 193, 203 (cert. den. 342 U. S. 829); *Cardinale* v. *Cardinale*, 8 Cal. 2d 762, 68 P. 2d, 351; *Calhoun* v. *Calhoun*, 70 C. A. 2d 233, 160 P. 2d, 923.

(2) *Romaine* v. *Chauncey*, 129 N. Y. 566, 570; *Turner* v. *Woolworth* 221 N. Y. 425, 428-429.

(3) *Wilson* v. *Hinman*, 182 N. Y. 408.

New York, California and Nevada are not States where a non-statutory equity action for support of a wife may be maintained. No action for a separate maintenance only, may be brought in New York[4]. If this separation action had been dismissed for any reason other than the bar of the Nevada decree, then no alimony could be awarded the wife because Sec. 1170-b, does not apply in such an instance and no rights otherwise were vested in her under the New York support laws[5].

We believe the majority below was overly enthusiastic in interpreting *Armstrong* v. *Armstrong*, supra; that there, ". . . all the justices seemed to have agreed that a state may validly grant alimony after and in spite of a foreign ex. parte divorce." We have carefully examined the *Armstrong* opinion. With all due respect to the Court below, we fail to detect therein anything which seems to indicate that conclusion. This Court appears to have affirmed in the *Armstrong* case because in granting the decree of divorce the Florida Court did not finally foreclose the wife from a future award of alimony.

As far as we are aware, the principle enunciated by this Court in *Thompson* v. *Thompson*, (1913) 226 U. S. 551, 566-567, still is good law. For, as did the *ex parte* final Virginia divorce decree in that case, so does the Nevada decree at bar, finally cut off any right in the wife to receive alimony. (Appendix 71). The *Thompson* case was referred to by this court and not disapproved, in *Estin* v. *Estin*, 334 U. S. 541, at p. 547.

We do not believe that the marital laws of the sole places where the parties dwelled together as husband and wife no longer have any effect and that merely by changing her

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(4) *Ramsden* v. *Ramsden*, 91 N. Y. 281; *Johnson* v. *Johnson*, 206 N. Y. 561.

(5) *Ross* v. *Ross*, 290 N. Y. 887; *Querze* v. *Querze*, id. 13, 18; *Weintraub* v. *Weintraub*, 302 N. Y. 104, 108.

place of abode a wife may revolutionize the marriage obligation as understood when contracted by both parties; nor that the former wife may now seek out a better place in a State where post-marital maintenance prevails, and unilaterally establish new rights for herself.

While it is now an accepted fact that either spouse may export his or her marital status to another State, it does not follow that either one may then inject into the status a new obligation which had not existed at the point of departure. It seems to us to be intrinsically wrong to hold that the State which the parties have adopted as their marital abode, subjecting themselves to the domestic way of life ordained by that community, may only grant the husband a license to remarry and that it has no power to abridge the inchoate interests of the wife in the marriage upon her subsequent departure.

Nevada was the husband's domicile at the time of the marriage and *ipso facto* it became the domicile of the wife[6]. The law of domicile at the time of the marriage regulates the construction of the marriage contract.[7] If freedom from obligation to pay alimony upon divorce was inherent in the marriage relation as contracted by these parties and unchanged until the time of their physical separation, then how could New York validly impose a new post-marital obligation upon a non-resident to support his former wife?

By the dismissal of the wife's first action, New York proclaimed it had no interest in her alleged matrimonial grievances, for jurisdictional reasons at least. Then, New York conveniently synthesized jurisdictional interest. It permitted the former wife, after having been divorced, to complete jurisdictional requirements of residence for

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(6) *Matter of Daggett*, 255 N. Y. 243, 246; *Gray* v. *Gray*, 143 N. Y. 354, 359.

(7) *Cunningham* v. *Cunningham*, 206 N. Y. 341.

one year, in order to maintain an action for separation based upon the fictitious allegations that she is a married woman and resident in New York. The Nevada decree was entitled to full faith and credit at all times since its rendition, not just some of the time.[8]

It will be noted that Civil Practice Act, Sections 1165-a(3) and 1166 which were enacted long before Section 1170-b had any incipiency, relate to the right of a married woman (and not a divorced woman) to establish a residence for the purposes of commencing a separation action. Civil Practice Act, Sec. 1161, specifying the grounds upon which an action for separation may be brought, expressly states: "An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, . . ."

The existence of the marriage relation is an essential element of an action for a separation.[9] We believe that **Civil Practice Act, Section 1170-b, denied Mr. Vanderbilt due process and equal protection of the laws, when construed below to permit his former wife to maintain a separation action in the false guise of a married woman after she had been divorced.**

Petitioner was denied the equal protection of the laws, since no New York wife is permitted to maintain an action for a separation once she has been divorced in New York. She may not even receive support there in a separation action (not involving a prior divorce) which has been dismissed.[10]

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(8) *Davis* v. *Davis*, 305 U. S. 32, 40.

(9) *Bannon* v. *Bannon*, 270 N. Y. 484, 488; *Fischer* v. *Fischer*, 254 N. Y. 463.

(10) *Ross* v. *Ross*, *supra*, 290 N. Y. 887.

Although proclaiming innocence, the New York Legislature actually tailor-made Sec. 1170-b to fit a foreign divorce by expressly providing that, if the reason for the dismissal is the prior divorce judgment, then alimony may follow. If Mr. Vanderbilt had not divorced his wife and her action had been dismissed for any other reason, she could not be awarded alimony. A New York judgment of divorce would be conclusive and not amenable to a subsequent separation suit founded upon a false allegation of an existing marriage. The prior judgment would not be subject to collateral attack.[11] The statute is in reality the instrument of prejudice against foreign ex parte divorces foreseen by Mr. Justice FRANKFURTER and Mr. Justice JACKSON in *Estin* v. *Estin*, supra, at pages 552, 554.

There is nothing in the process commencing this action which even hints that the wife was seeking to strike down the husband's Nevada decree as invalid and that if she failed she would seek maintenance as a divorced woman under Sec. 1170-b. It is well established that when seeking to tear down the presumptive validity of an ex parte divorce decree of another State the former wife has a heavy burden of pleading and proving its invalidity.[12] But in this case Mrs. Vanderbilt was permitted to commence a separation action and to cause her former husband's property to be seized in New York, without making any pretense at pleading or claiming the Nevada decree to be invalid. Its presumptive effect was disregarded upon our preliminary motion to dismiss the action for lack of jurisdiction. However, the trial Court, even against the expressed reluctance of the wife's counsel to proceed with proof in an effort to undermine the jurisdictional validity of the Nevada decree, compelled him to do so. (fols. 1042, 1047-1055).

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(11) *Arcuri* v. *Arcuri*, 265 N. Y. 358.

(12) *Garvin* v. *Garvin*, 302 N. Y. 96, 102.

We should like to make one additional point on the due process question—that is, the severity with which the Appellate Courts below ruled that so long as the plaintiff testified as to defendant's alleged misconduct, that formed the proper basis for an award against him under the label "as justice may require". Full faith and credit also was denied the divorce decree when the intermediate Appellate Court below made findings of misconduct on defendant's part. This was done despite the fact that at the conclusion of plaintiff's case for a separation, the complaint was dismissed because of the finding of the validity of the Nevada domicile and the trial Court expressly stated only that it proceeded to take proof of the parties "finances, income, and plaintiff's needs". (Appendix 37—fols. 149-150, 181-186, 1331, 1334, 1346-1350).

The Court below disregarded the pronouncement of this Court in *Williams* v. *North Carolina*, 325 U. S. 226, 229, to the effect that the divorce judgment is conclusive on the merits as to everything but jurisdiction.

We do not understand why the Appellate Courts below insisted that defendant had had his full day in court when it is so clear from the record that by the dismissal of the separation complaint he was not required or permitted to meet the charges of misconduct and was refused instruction by the trial Court as to what charges he was required to meet under the banner "as justice may require". (fols. 1353-1370). The manner in which this subject was handled below, we believe, is completely obnoxious to an ordinary sense of fair play and equal justice. Equity has followed the woman and not the law.

Conclusion

WHEREFORE petitioner respectfully prays that a writ of certiorari issue as above requested.

Dated: August 6th, 1956.

Respectfully submitted,

SOL A. ROSENBLATT,
CHARLES RODEN,
Counsel for Petitioner

Opinion of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

No. 39.

PATRICIA W. VANDERBILT,
Respondent-Appellant,
vs.
CORNELIUS VANDERBILT, JR.,
Appellant-Respondent,
and
THOMAS F. McCOY,
Receiver and Sequestrator-Respondent.

Decided May 31, 1956

DESMOND, *J.*:

The principal question is as to the validity and applicability of this provision of section 1170-b of our Civil Practice Act, enacted in 1953:

> "In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife."

In 1948 plaintiff, then domiciled in Nevada, and defendant, then domiciled in California, married in Connecticut and together established in California a domicile which continued (despite much travel in this country and Europe) till they separated in September, 1952. After the separation the wife immediately went to New York City. In October, 1952, she sued in New York for a separation but that suit was dismissed because of the one-year residence requirement of subdivision 3 of section 1165-a of the Civil Practice Act. After a visit to California, plaintiff returned to New York in February, 1953, and has since resided in this State. In March, 1953, defendant husband brought in Nevada a suit for divorce, process in which was served on the wife in New York. The wife did not appear or answer in that suit which in June, 1953, produced a divorce decree in favor of the husband. In April, 1954, plaintiff, effecting service through publication of the summons and sequestration of his assets (see Civ. Prac. Act, § 1171-a) in New York, commenced this action in the Supreme Court, New York County, praying for a separation on the ground of cruelty and abandonment, and for an award of alimony (there were no children of the marriage). Defendant, appearing specially, moved to vacate the sequestration and to dismiss this action on the ground that the marriage no longer existed, and that there was in New York State no matrimonial domicile or status, or domicile of plaintiff. That motion of defendant was heard and dismissed before trial but defendant availed himself of the permission then given him to plead in his answer the alleged lack of jurisdiction over his person and over the subject matter of the cause. His answer in this suit, besides denying all the complaint's allegations of cruelty and abandonment, contained also a purported complete defense in which he called the court's attention to the Nevada divorce judgment and asserted that "full faith and credit" therefor was, under the Federal Constitution, a bar to the maintenance of this

action. We agree with defendant that he has not, by his subsequent activities in the case, waived the contentions he is still making, as to lack of personal jurisdiction (see Civ. Prac. Act, § 237-a, subds. 3[c], 4). We construe the judgment below not as one in personam against defendant but as fixing the amount of the alimony and directing its payment out of the sequestered property.

When this action came to trial, plaintiff went forward with testimony as to the alleged acts of cruelty and abandonment. Defendant did not take the stand and called no witnesses to deny that testimony. Plaintiff attempted also to establish factually that defendant's previously obtained Nevada divorce was invalid because, she urged, defendant did not have a bona fide domicile in that State (*Williams v. North Carolina*, 325 U. S. 226). We can dispose of that latter issue right now by holding that there was sufficient evidence to justify the finding made by both courts below in this cause that defendant did have a good faith domicile in Nevada for a sufficient period before his divorce decree was handed down. That proof included a showing that defendant had lived and voted and owned property in Nevada for many years before his marriage to plaintiff, that plaintiff and defendant lived there together in the early months of their marriage, that defendant returned there some months before the divorce and that defendant has continuously maintained a residence in Nevada since the divorce. The various contradictory statements shown to have been made by defendant on this subject did no more than set up a question of fact as to the good faith of the Nevada pre-divorce domicile, an issue of fact which has been conclusively settled in favor of defendant by the courts below.

After both sides had put in proof, defendant renewed his motion, previously made at the end of plaintiff's case, to dismiss the complaint on the grounds of lack of juris-

diction and of the alleged binding effect of the prior divorce. The trial court, holding that the Nevada divorce was binding in New York to the extent of dissolving the marriage, dismissed so much of the complaint as asked for a judgment of separation but (on the authority of Civ. Prac. Act, § 1170-b, *supra*) continued to entertain so much of the action as prayed for support and maintenance. Defendant objected to this on the jurisdictional grounds already described, also on the grounds that the Nevada judgment had terminated the marriage and all its obligations, that section 1170-b is unconstitutionally vague and lacking in standards as to what "justice may require", that section 1170-b if so applied would violate not only New York common law but the Full Faith and Credit requirement of the Federal Constitution, and that plaintiff had not been a resident of New York State for the one-year period required by subdivision 3 of section 1165-a of the Civil Practice Act, nor for any other period. The courts again denied defendant's dismissal motion.

The trial court then took the proofs offered by plaintiff as to amounts suitable and necessary for her support. The trial came to an end after a renewal and another denial of defendant's dismissal motions. Later, the court awarded plaintiff $250 per week for support plus an award of $3,500 for counsel fees and expenses (her counsel had previously been awarded and paid $2,500 for such fees and expenses). The support money was directed to be paid from June 8, 1954, the date of the commencement of this action. Defendant's brief argues against the amount of this award and as to its retroactivity, but these determinations in those respects were, on this record well within the discretion of the trial court, affirmed by the Appellate Division. The same answer goes to so much of plaintiff's cross appeal as disputes the adequacy of the support allowance.

We come, then, to the remaining, and principal, questions of law:

1. Does this case come within the language and intent of section 1170-b of the Civil Practice Act?

2. If the answer to the first question is "yes", is section 1170-b, so applied, invalid as violative of the Federal Constitution, or otherwise?

There should be no doubt as to the applicability hereto of section 1170-b. This is certainly an action for separation, where the court refused "to grant such relief by reason of a finding by the court that a divorce * * * had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained". Plaintiff, having resided in this State for the required one-year period, had standing to bring such a suit and jurisdiction was effected by the sequestration of defendant's New York assets. There is nothing in the statute's language to suggest that it was intended to apply only to marriages where the parties had lived together in this State as their matrimonial domicile. Presumably, the Legislature was moved to action by the clear and cogent reasoning of a report made to the Legislature by the Law Revision Commission (1953 Report of N. Y. Law Revision Commission, pp. 463-480). The report (p. 467) cited *Estin* v. *Estin* (296 N. Y. 308, aff'd 334 U. S. 541) as holding that "A wife who has obtained in New York a separation order with maintenance provisions may enforce these provisions against her husband even though he may subsequently have obtained an *ex parte* divorce entitled to recognition under the Full Faith and Credit Clause of the Constitution of the United States". But, the Commission pointed out (as had one of the Supreme Court opinions in *Estin*) that there was no *procedure* available in New York State whereby similar protection of her rights to support could be had by a wife unless she, prior to the foreign divorce, had obtained an alimony order in a separation suit, as had Mrs. Estin. The procedural difficulty in this State was, of course, that

our courts have no power without statutory authority to grant maintenance to a wife and (before section 1170-b was passed) there was no statutory authority to award such alimony except as incidental to a matrimonial action (*Ramsden* v. *Ramsden*, 91 N. Y. 281; *Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456; *Johnson* v. *Johnson*, 206 N. Y. 561; *Weintraub* v. *Weintraub*, 302 N. Y. 104; Civ. Prac. Act, § 1170). Recognizing that the doctrine of "divisible divorce" had been firmly established in law (*Estin* v. *Estin*, *supra*; *Lynn* v. *Lynn*, 302 N. Y. 193, certiorari denied 342 U. S. 829), the Law Revision Commission and the Legislature set out to remove the procedural bar against a wife's obtaining in the New York courts protection of those rights to support which remained to her after and despite a foreign divorce, even though that foreign divorce had effectively terminated her marriage. Therefore, the purpose, language and effect of section 1170-b support the judgment granted plaintiff in this case. What other and different situations the statute may properly be applied to, we need not and should not now specify.

The second question of law is as to the validity of the statute itself. Defendant's argument against validity boils down to an assertion that the *Estin* holding (*supra*) applies to the particular *Estin* fact pattern only. Defendant says that the court in *Estin* was dealing with a prior New York separation-alimony judgment and a later Nevada marriage-status-termination judgment, and giving effect to both those judgments. Such is not, of course, the situation here. But the situation here is in its material elements just the same as in *Armstrong* v. *Armstrong* (350 U. S. 568) where all the Justices seem to have agreed that a State may validly grant alimony after and in spite of a foreign ex parte divorce. (See also, *May* v. *Anderson*, 345 U. S. 528, as to custody of children.) We must look to the rationale, not the special facts, of *Estin* and *Armstrong* and we find that rationale to be the same as was expressed in our

Lynn v. *Lynn* opinion (302 N. Y., 193, 200-201, supra) thus: "* * * a divorce decree may be completely effective to dissolve a marriage and yet completely ineffectual to alter certain legal and economic incidents of that marriage" (see *Hopson* v. *Hopson*, 221 F. 2d 839). Mrs. Estin, fortunately for her, had gotten her support rights defined and adjudicated by a New York judgment before her husband went off for his foreign divorce. Section 1170-b now makes it possible for a wife to get such an adjudication after the foreign-State divorce. Until *Williams* v. *North Carolina* (325 U. S. 226, *supra*) made effective in this State ex parte divorces like that gotten by this defendant, such divorces had no effect here as to either marriage status or property rights. Then came *Williams* v. *North Carolina*, and New York had to give effect to such decrees as terminating marriages. But in the background was *Pennoyer* v. *Neff* (95 U. S. 714) and its ancient and undisturbed rule that personal service within the State where suit is brought (or waiver of such service) is required for due process of law to support a personal judgment. So, that part of a foreign (non-personal service but otherwise jurisdictionally valid) divorce decree which dealt with status had to be given effect in New York as terminating the marriage but was entitled to no effect at all so far as support or other property rights were concerned. The question is not whether the economic liabilities of a marriage can validly be held to survive a valid divorce. The point is that the divorce obtained by defendant was valid as to status only, but not as to property. The holding that such a divorce judgment was not effective as to property meant necessarily that the one who obtained it could claim no protection from it as to property. Defendant would have us say that the power to preserve, unimpaired by a foreign non-personal divorce, the liability of a husband to support his wife, is a power of that State only which has "jurisdiction of the marriage". We find no such strict limitation. True,

New York never had jurisdiction of this marriage res in the sense that New York was the parties' domicile while they lived together. But when the husband, abandoning his wife, left their California domicile to establish a Nevada domicile for his own purposes, the abandoned wife had a right to set up a New York domicile for herself and bring the matrimonial domicile to New York with her (*Hunt* v. *Hunt*, 72 N. Y. 217, 242, 243; *Dean* v. *Dean*, 241 N. Y. 240, 244; *Matter of Daggett*, 255 N. Y. 243, 247). That right she exercised in this instance before the Nevada judgment was entered and she satisfied New York's residence requirements before suing for a separation (Civ. Prac. Act, § 1165-a). We need not decide whether she would have the same right to come into New York, even after a foreign-State divorce, to take advantage of section 1170-b.

We will now consider briefly several other arguments advanced by defendant. He says that his Nevada judgment has been denied the "full faith and credit" the Federal Constitution (Art. IV; §1) demands for it. But that assertion involves two erroneous assumptions and either of those errors destroys the alleged constitutional point. Defendant assumes that New York would not enforce its section 1170-b as against a prior non-personal New York divorce judgment, and then goes on to assume that New York's supposititous refusal to apply section 1170-b as against one of its own New York judgments would mean that New York would be giving a foreign judgment less protection than a local judgment as against section 1170-b. As to defendant's first assumption, there is nothing in our statute to support the conclusion that it is inapplicable where the prior judgment was obtained in New York (the Law Revision Commission report and recommendation certainly make no such distinction, but instead recommends applicability "whether the husband's *ex parte* adjudication of marital status was obtained in a foreign court or a New York court" Pg. 468. Actually, the basis for this assumption by defendant is an

idea which pervades defendant's whole argument—that is, that it is fundamental and unchangeable New York law that an already divorced wife may never be awarded maintenance by a New York court and that an action for separation or divorce in New York presupposes an existing valid marriage (see *Bannon* v. *Bannon*, 270 N.Y. 484, 488). But section 1170-b, to the extent that it applies, has changed that old New York policy. We can go even farther, however, and declare that even if section 1170-b was unavailable as against a New York divorce, that circumstance would not mean that the New York judgment was getting more, and the Nevada judgment less, faith and credit in New York. Nevada's judgments put in evidence in New York are entitled to the same effect as they are given in Nevada, and, to avoid unconstitutional discrimination (U. S. Const., Art. IV, § 2), the same effect New York's own similar judgments are given in New York. But under the "divisible divorce" doctrine, defendant's Nevada divorce had no effect (any more than it said anything in terms) as to plaintiff's property rights. Its sole effect was to end a marriage and it has been given that effect in New York.

Defendant brands as error the making by the Appellate Division, in its order and in its judgment, of a new finding of fact that defendant had violently assaulted plaintiff and had been guilty of other cruel treatment of plaintiff which endangered and injured her health. Since the record justifies that finding, the Appellate Division had the power to make it, although the trial court had not done so (see *Bernardine* v. *City of New York*, 294 N.Y. 361, 366). As to that finding being contrary to the Nevada court's earlier determination that defendant was entitled to a divorce because of plaintiff's "Extreme Cruelty", it is settled that the Nevada finding in an in rem proceeding while conclusive as to the marriage status being dissolved, does not bind plaintiff personally nor is it conclusive as to any fact upon which the Nevada judgment is based.

(*Durant* v. *Abenroth*, 97 N.Y. 132, 141; Matter of Holmes, 291 N.Y. 261, 270, citing restatement, judgments § 74).

Other charges by defendant of deprivation of due process are without merit. He complains that he was denied a fair opportunity to present proof as to alimony but the record does not bear him out. He complains as to the vagueness of the phrase in section 1170-b "as justice may require". But that same phrase has been for many years in section 1170 of the Civil Practice Act with respect to questions of custody of children and temporary and permanent alimony in separation and divorce suits. It means (see as used in Election Law, §330) that there are no "as matter of law" requirements one way or the other as to those matters which are to be dealt with in the discretion of the courts, on all the facts. Similarly without substance is defendant's statement that he was given no notice by pleadings or otherwise, in this suit brought obstensibly for a separation, that even if no separation were to be granted, an award for maintenance might still be in the offing. Adequate notice was given by the statute itself which warned that if a separation should be refused because of the foreign divorce judgment, maintenance might still be awarded.

The judgment should be affirmed, with costs to plaintiff.

Dissenting Opinion

STATE OF NEW YORK

COURT OF APPEALS

No. 39.

PATRICIA W. VANDERBILT,
Respondent-Appellant,

vs.

CORNELIUS VANDERBILT, JR.,
Appellant-Respondent,

and

THOMAS F. McCOY,
Receiver and Sequestrator-Respondent.

FULD, *J.*: (*dissenting*):

In my opinion, section 1170-b of the Civil Practice Act as here construed and applied offends against the full faith and credit clause of the Federal Constitution, and neither *Estin* v. *Estin* (334 U.S. 541, affirming 296 N.Y. 308), nor (*Armstrong* v. *Armstrong*, 350 U.S. 568), supports a contrary conclusion.

It is settled in this state that the duty of support flows from the marital status. And, before the enactment of section 1170-b in 1953, when that status terminated, so too did the duty of support, except insofar as provision for continued support may have been made in the judgment dissolving the marriage. "Such a claim in itself furnishes no foundation for a cause of action; it is a mere incident

of the judgment in a matrimonial action." (*Querze* v. *Querze*, 290 N.Y. 13, 18; see *Weintraub* v. *Weintraub*, 302 N.Y. 104, 108.)

There is no doubt that the marriage between plaintiff wife and defendant husband was effectually terminated by the Nevada divorce decree which defendant procured in June of 1953. Although the wife was not subject to the personal jurisdiction of the Nevada court, that tribunal was unquestionably empowered to adjudicate the termination of the marriage at the suit of the husband who was domiciled in that state. (See *Estin* v. *Estin, supra*, 334 U.S. 541, 544; *Williams* v. *North Carolina*, 317 U.S. 287.) And examination of the decree then rendered demonstrates that it also provided for the termination of defendant's duty to support plaintiff. In so many words, it recited that the marriage between the parties was "dissolved absolutely and forever and *they hereby are freed and released from the bonds of matrimony and all the duties and obligations thereof*". Under Nevada's decisional law, it seem clears that, in the absence of a provision either awarding alimony to the wife or reserving jurisdiction to do so, "there can be no grant of alimony after such a divorce." (*Sweeney* v. *Sweeney*, 42 Nev. 431, 438-439; see *Lynn* v. *Lynn*, 302 N.Y. 193, 203, cert. den. 342 U.S. 849.) That being so, it follows that the decree granted to defendant by the Nevada court must be taken as having cut off plaintiff wife's right to alimony. (See *Lynn* v. *Lynn, supra*, 302 N.Y. 193, 203-204.)

A different case would have been presented if, prior to the termination of the marriage by the Nevada divorce decree, the New York courts had adjudicated with respect to defendant's duty of support and had rendered a judgment against him directing payment of such support. The wife's property right in the judgment would then have assumed a status independent of the continuance of the

marital relationship, and the subsequent dissolution of the marriage by divorce would have been ineffectual in and of itself to deprive the wife of that property right—*unless* the divorcing court had acquired personal jurisdiction over the wife and had adjudicated with respect to her rights in the support judgment. That was the extent of the decision in *Estin* v. *Estin* (*supra*, 334 U.S. 541, affg. 296 N.Y. 308; see, also, *Lynn* v. *Lynn*, *supra*, 302 N.Y. 193, 202). Emphasizing that New York had "evinced a concern with this broken marriage when both parties were domiciled in New York and before Nevada had any concern with it" (334 U.S., at p. 547), the Supreme Court stressed as dominant the existence of the New York judgment (334 U.S., particularly pp. 548-549; also, dissent of FRANKFURTER, *J.*, pp. 549-550) and treated it as "a property interest" with a separate status of its own (334 U.S., at p. 548):

> "The New York judgment is a property interest of respondent, created by New York in a proceeding in which both parties were present. It imposed obligations on petitioner and granted rights to respondent. The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations."

In 1953, however, the statute now under consideration, section 1170-b of the Civil Practice Act, was passed to empower our courts to award alimony to a wife, against whom the husband had procured a valid *ex parte* divorce, even though she had not previously obtained a judgment or order for support. (See 1953 Report of N.Y. Law Rev. Comm. [N. Y. Legis. Doc., 1953 No. 65 (K)], pp. 463-480; The Commission and The Courts, 40 Cornell L.Q. 646, 656.) But that did not mean that the courts of this state would be authorized under all circumstances to award the wife

such alimony. If, for instance, the court of the other jurisdiction granting the divorce had actually decided to terminate the husband's duty of support and deny alimony to the wife, then the Federal Constitution would compel our courts to accord to that portion of the judgment, as well as to the part terminating the parties' marital status, full faith and credit and deny the wife's application for maintenance under the 1953 statute.

In other words, section 1170-b may be applied validly, that is, consistently with the dictates of the full faith and credit clause, only where the earlier *ex parte* judgment of divorce "did not purport to adjudicate the absent wife's right to alimony." (*Armstrong* v. *Armstrong, supra*, 350 U.S. 568, 569.) In such a case, to quote from *Armstrong*, the courts of the second state (Ohio), "in awarding alimony to the wife, did not in fact fail to give full faith and credit to the Florida decree" (350 U.S., at p. 569.) However, in so deciding, as Mr. Justice MINTON observed for the majority. (p. 569), the court did not reach the question whether the courts of the second state may disregard the determination in the prior divorce action that the wife was not entitled to support.

In such a case as the present, where the earlier Nevada decree in effect denied alimony to the wife (see, *supra*, pp. 354-355),[1] section 1170-b may be constitutionally invoked only on the theory that Nevada, while having jurisdiction to adjudicate the termination of the marital relationship, lacked the power, as a matter of due process, to adjudicate the concomitant termination of incidents of that relationship, which have no independent status of their own. To that I cannot subscribe. Any such arbitrary differentia-

1. As noted above, the Nevada decree here involved did in terms free and release the husband from "all the duties and obligations" flowing from the marital relationship, and that terminated the wife's right to support. (See *Sweeney* v. *Sweeney, supra*, 42 Nev. 431, 438-439; *Lynn* v. *Lynn, supra*, 302 N. Y. 193, 203.)

tion, between the marriage status and its inseparable incidents, not only does violence to basic principles of logic, but flies in the face of the constitutional requirement that the Nevada judgment be given *full* faith and credit. (Cf. *Estin* v. *Estin*, *supra*, 334 U. S. 541, 554, *per* JACKSON, *J.*, dissenting.)

The deceptive appeal of the phrase "divisible divorce" should not be permitted to obscure the basic concepts involved. A finding of divisibility may be appropriate where, as in *Estin*, the particular right at issue is a distinct property right, embodied in a previously granted judgment, which is no longer dependent, for its recognition or enforcement, upon the marital relationship, or where, as in *Armstrong*, the court rendering the divorce has itself severed the issue of support and left it subject to separate adjudication in the future. The situation is, however, decidedly different where, as in the case before us, the claim asserted depends for its very existence on the continuance of the marital status and that status and its incidents have both been terminated by a jurisdictionally valid judgment of divorce.

I find myself unable to agree with the contrary views expressed by the minority of the Supreme Court, through Mr. Justice Black, in the *Armstrong* case (*supra*, 350 U. S. 568, 575, et seq.), to the effect that the court rendering the *ex parte* divorce has no jurisdiction to pass upon the question of alimony. Justice Black reached that conclusion on the assumption that the denial of alimony constituted the rendition of "a personal judgment" against the wife "depriving her of all right to alimony." I cannot accept that reasoning, for it seems to me to rest on the erroneous premise that a mere incident of the marital status, which "in itself furnishes no foundation for a cause of action" (*Querze* v. *Querze*, *supra*, 290 N. Y. 13, 18), is the equivalent of an independent right.

In any event, however, the present case would seem to fall outside of the underlying policy of section 1170-b. At the time the Nevada judgment of divorce was rendered, plaintiff wife had no standing in New York to maintain the present action for separation and, by that token, had no enforceable right to invoke the benefits of the section. Where the husband is not a resident of this state and the parties were not married here, the wife does not have standing to maintain an action for separation *unless* she has been a resident of the state "for at least one year continuously at any time prior to the commencement of the action" (Civ. Prac. Act, §1165-a). Plaintiff first selected this state as her place of continuous residence in February, 1953, only one month before defendant instituted suit in Nevada and but four months before the divorce decree was granted by that state.

Section 1170-b authorizes an award of support "as justice may require," and the legislative design is thus made clear that any award must be consistent with the public policy of the state. Obviously, the legislative purpose was to deal with broken marriages with which New York was directly concerned. (See *Estin* v. *Estin*, *supra*, 334 U. S. 541, 549.) In order not to pervert that aim, the grant of relief should be restricted to a case where there is a substantial *nexus* between the particular marriage and this state. To read the statute as opening the door to wives from other states who take up residence in this state solely for the purpose of invoking section 1170-b, *after* the rendition of an *ex parte* judgment of divorce in another state, or on the eve of judgment or the institution of the divorce action, not only goes far beyond the legislative purpose, but also serves to flout the principle underlying the full faith and credit clause.

Only by confining the statute to the situation where the wife had standing to institute the matrimonial action

in this state at the time that the foreign divorce was granted, may New York's dealings with such a broken marriage be restricted "to the matters of her dominant concern" (*Estin* v. *Estin*, *supra*, 334 U. S., at p. 549) and unseemly conflicts between this state and other jurisdictions avoided.

The complaint should have been dismissed. Accordingly, the judgment should be modified by deleting all but the first adjudging paragraph thereof, and, as so modified, affirmed, with costs in all courts.

CONWAY, *Ch. J.*, FROESSEL, VAN VOORHIS, and BURKE, *JJ.*, concur with DESMOND, *J.*; FULD, *J.*, dissents in an opinion in which DYE, *J.*, concurs.

Judgment affirmed.

Opinion of the Appellate Division

SUPREME COURT

APPELLATE DIVISION — FIRST DEPARTMENT

October 1955.

David W. Peck, *P.J.*,
Charles D. Breitel,
Earle C. Bastow,
Joseph A. Cox,
Francis Bergan, *JJ.*

9419-9420

PATRICIA W. VANDERBILT,
Plaintiff-Respondent,

vs.

CORNELIUS VANDERBILT, JR.,
Defendant-Appellant,

and

THOMAS F. McCOY,
Receiver and Sequestrator-Respondent.

Appeals from judgment of the Supreme Court at Special Term (DIFALCO, *J.*) entered March 31st, 1955 in the New York County Clerk's office. Plaintiff appeals from the judgment insofar as it dismisses the complaint and also insofar as the allowances for maintenance and counsel fees are insufficient; and defendant

appeals insofar as the judgment awards maintenance and counsel fees and costs and directs payment thereof by the Receiver and Sequestrator.

Sol A. Rosenblatt, of counsel (Charles Roden with him on the brief; Sol A. Rosenblatt, attorney) for Defendant-Appellant.

Monroe J. Winsten, of counsel (Charles L. Raskin with him on the brief; Monroe J. Winsten, attorney) for Plaintiff-Respondent.

Jeremiah M. Evarts for Receiver and Sequestrator-Respondent.

BREITEL, *J.*:

This is a matrimonial action in which plaintiff wife has recovered a judgment, after trial, for maintenance under section 1170-b of the Civil Practice Act. The action, in the first instance, was the classic one brought for separation under section 1161. Because of a valid prior decree of divorce in favor of defendant husband obtained in Nevada, without personal jurisdiction over the wife, relief was denied under section 1161 and alternative relief granted under the new statute, section 1170-b. The judgment in favor of plaintiff wife awarded her $250. a week maintenance from the commencement of the action and additional counsel fees of $3,500.00. The judgment also declared that the Nevada divorce decree in favor of defendant husband was valid and a bar to plaintiff wife's right to a separation. Defendant husband entered a special appearance in the case and the court declined to find, as requested by plaintiff wife, that the defendant husband had made a general appearance, thus making the judgment *in personam*, rather than one *quasi in rem* and limited to enforcement out of sequestered assets.

Both parties appeal. The husband asserts that the statute, section 1170-b, is unconstitutional and that, in any event, there was no warrant for its application. The wife, on her appeal, contends that the husband's Nevada divorce was proven invalid, that the monetary awards are inadequate, and that the court should have found that the husband had appeared generally in the action.

The judgment should be affirmed in all respects.

The case is one of first impression under section 1170-b, enacted by Chapter 663 of the Laws of 1953. The statute authorizes a court in a matrimonial action to direct maintenance for a wife "as justice may require", where the court is otherwise barred from granting a divorce, separation or annulment by reason of the prior granting of a judgment or decree for divorce or annulment in an action in which personal jurisdiction was not obtained over the wife.*

The parties were married on September 7th, 1948, in the state of Connecticut. It was the husband's fifth marriage; it was the wife's second. The prior marriages of the parties had been terminated by divorce. At the time of the marriage the husband was domiciled in Nevada. The wife was domiciled in California. Shortly after the marriage and until the physical separation between the parties in September, 1952, the couple were domiciled in California.

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* The statute reads as follows:

"§1170-b. *Maintenance of wife where divorce or annulment previously granted on non-personal jurisdiction.* In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the mainte-

There was no issue of the marriage. The wife has a young daughter by her first marriage.

After the parties physically separated in September, 1952, the wife came to New York and, in October of that year, sued for separation. Her complaint was dismissed on February 27th, 1953, because she had not resided in New York for one year (Civ. Prac. Act, §1165-a, subd. 3). Such dismissal is concededly *res judicata* that there had been no actual matrimonial domicile in New York.

Just before the dismissal of her complaint in the first action, the wife returned to California. She came back to New York on February 12th, 1953, and has remained here since. In March, 1953, the husband sued for divorce in Nevada where he claimed to have resumed his domicile. That action was prosecuted by service of process on the wife outside the state of Nevada. She never appeared in that action and therefore no personal jurisdiction was obtained therein over her. It resulted in a decree in favor of the husband on June 30th, 1953.

In April, 1954, the wife commenced service by publication in this action. The service was completed by June, 1954. The complaint alleged cruelty and abandonment by the husband and asked simply for a separation with support and maintenance. No reference was made to the Nevada divorce which had in the meantime been obtained by the husband. The husband's assets in New York were sequested under section 1171-a of the Civil Practice Act. The husband entered a special appearance, and moved to dismiss

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nance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this section shall extend to unpaid sums or installments to become due thereafter."

the complaint and vacate the sequestration on the ground that the wife was, by reason of the Nevada decree, an ex-wife, and that therefore there was no jurisdiction over the person, or the action. The motion was denied with leave to interpose the defense in the husband's answer (133 N.Y.S. 2d 314). This he did, and purported thereafter to defend the case only on the questions that the wife had no domicile in New York, that there was no matrimonial domicile in New York, and that there was no marital status upon which to base the complaint or the sequestration. He did not attend and made no attempt upon the trial to meet by his own testimony or that of other witnesses the issues of cruelty and abandonment.*

The prime issue tendered is whether a wife, who had never theretofore obtained judicial provision for her support, can maintain an action resulting in a direction for maintenance, after divorce in an action brought by the husband in which she was not served personally within the jurisdiction and in which she did not appear nor did she defend. If the answer to that question is in the affirmative, then the next issue is whether on the record the court was authorized to direct maintenance for the wife on the ground that justice so required.

Before the decisions in *Williams* v. *North Carolina* (317 U. S. 287; 325 U. S. 226) the legal concept had prevailed for some time that a valid divorce established an indivisible unitary status, even in a case where the defendant had not been served personally or appeared. This would be true in either the divorcing state or the state of the wife's domicile. In either state, at least as to the same individual, the divorce was totally recognized or could be totally ignored.

* On this appeal the husband contends that he had no opportunity to meet these issues, but that is not so. The trial court clearly indicated that after it would decide the motion to dismiss at the close of the wife's case, the husband could meet any issues that he considered relevant.

But it could not, in either of the states, be partly recognized and partly ignored. (*Haddock* v. *Haddock*, 201 U.S. 562.)

In the *Williams* cases the concept evolved that a divorce, based on constructive service alone, could, even in one state, be divisible. Later, the concept was advanced to a further stage, namely, that the marital status between the parties might be severed but that, despite such severance, the husband's economic marital obligation could survive. This development reached its clearest expression in *Estin* v. *Estin* (334 U.S. 541, affirming 296 N.Y. 308). In the Estin case it was held that a wife who had not been personally served or appeared was, nevertheless, entitled to enforce as a continuing right a judgment for separation obtained before the husband's decree of divorce in another state. In *Lynn* v. *Lynn* (302 N.Y. 193) it was made quite clear that the divisibility of the divorce decree obtained outside the state would not share the same character of divisibility if the wife appeared or defended the action brought outside the state for a divorce. It was therefore held that a prior support judgment yielded to the overriding effect of the Nevada decree obtained by the husband. In so holding, however, the court reaffirmed the concept of divisible divorce insofar as it applied to divorce decrees obtained on constructive service alone. Said Judge Fuld, on behalf of the court: "The 'divisible divorce', anomalous though it may at first appear, has become a recognized concept; it is now familiar law that a divorce decree may be completely effective to dissolve a marriage and yet completely ineffectual to alter certain legal and economic incidents of that marriage". (pp. 200-201)

What has happened then is that the courts, confronted with legislative difficulties in this area, have fashioned new concepts to meet the peculiar problems arising from the interplay of migrant divorce, the constitutional doctrine of full faith and credit, and the special interest of a state in

protecting its residents. Because the fashioning of these concepts is still in process, they, indeed, as Judge Fuld said, appear anomalous. The result is, however, that a divorce obtained on constructive service alone now has an effect merely limited to marital status, as distinguished from the obligations that arise from that marital status. This may not satisfy those who seek systematic consistency in the law and certainty of status in matrimonial relations, but its advocates hope that it represents a more realistic approach.

Yet, in the limited area with which we are now concerned, it would not be true to say that divisibility of marital status and the obligations that flow from it is entirely new. Divisibility always existed as between the spouses to a valid divorce based on constructive service alone. (See *Rigney* v. *Rigney*, 127 N.Y. 408, rev'd. on other grounds, *sub. nom. Laing* v. *Rigney*, 160 U.S. 531; *Haddock* v. *Haddock*, *supra*.) That, however, was a kind of vertical divisibility between the parties—one could be divorced and the other not. Now the concept of divisibility moves horizontally between the parties to separate the marital status from the marital obligations in each—both may be divorced for some purposes and not divorced for others.

Evidently, where we now stand, the valid divorce based on constructive service alone appears to be limited to the narrow status of marriage for purposes of remarriage and possible bigamy prosecution. At least, this would seem to be so insofar as the courts have passed on its effects. Certainly, however, the support obligations which derive from marital status are affected only by judgments in which the court has personal jurisdiction of the defendant.

Apart from rationale, the net effect produced by recent decisional law had been to afford severable support status for a wife divorced by constructive service alone, and only where she had prior judicial provision for support. For the wife who had not, prior to such constructive service

divorce, obtained a judgment or order for support, there was no available remedy. This was foreseeable in the *Estin* case. To many, this seemed an unfair discrimination.

In 1953, on the recommendation of the Law Revision Commission, the Legislature enacted section 1170-b (see 1953 Report of N.Y. Law Revision Commission, pp. 463-480; New York Legis. Doc. [1953] No. 65[K]).

Said the Law Revision Commission in recommending this enactment:

> "A wife who has obtained in New York a separation order with maintenance provisions may enforce these provisions against her husband even though he may subsequently have obtained an ex parte foreign divorce entitled to recognition under the Full Faith and Credit Clause of the Constitution of the United States. (*Estin* v. *Estin*, 334 U. S. 541, 68 Sup. Ct. 1213, 92 L. Ed. 1561 (1948).) The husband's divorce must be recognized as altering the marital status of the parties under the second *Williams* case (*Williams* v. *North Carolina*, 325 U. S. 226, 65 Sup. Ct. 1118, 89 L. Ed. 1577 (1942), but since the New York law was interpreted to permit a maintenance order in a separation action to survive a divorce, the prior maintenance order still prevails as far as the economic relations of the parties are concerned.
>
> "The *Estin* case called attention to the injustice to a New York wife whose husband has obtained a divorce in another state in an *ex parte* proceeding. Unless she had been able to get a separation order with maintenance prior to the foreign divorce, she has no remedy. Under the Civil Practice Act maintenance of the wife may be granted only as an incident to relief in a matrimonial action. Since 1883 it has been accepted law, moreover, that there is no inherent power in the Supreme Court to grant maintenance to a wife independent of statutory authority. *Ramsden* v. *Ramsden*, 91 N. Y. 281 (1883)." (p. 467).

The statute is no more than a legislative extension of the judicial concept that a divorce based on constructive service is divisible. Under the reasoning in the *Estin* case the state may provide for the enforcement of what are *in personam* financial obligations of the divorced husband. These obligations are deemed to survive constructive service divorce.* Anomalous though it may seem, it is no longer true that a divorce based on constructive service alone sunders in all aspects the marriage relation. It does so only for the very limited purpose of severing the marital status in the narrowest sense. While the *Estin* case turned on a surviving separation judgment, referred to in that case as a vested property interest, such a judgment merely declares and makes amenable to judicial enforcement a continuing economic obligation derived, but now severable, from the marital status.

Accordingly, the statute is valid for the reasons set forth. Nor is it necessary to the analysis to consider whether the statute may, as a matter of power, apply only to a wife who has had a prior matrimonial domicile in the state. The fact is that *since* she is only "divisibly divorced" she is also "divisibly married." She is married, and, if wronged, may move the marital domicile with her, for purposes of enforcing the husband's surviving *in personam* obligations to support and maintain her. An entirely different question might be presented if the Nevada divorce had been rendered before the wife took residence in New York. As a wronged wife, still undivorced, she brought the matrimonial domicile with her, even if it be only constructive matrimonial domicile. This is so despite the fact that more

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* Obviously, as was intended, the statute, with all its implications, applies to a New York constructive service divorce. (See 1953 Report of the Law Revision Commission, *supra*.) Moreover, a distinction between such New York divorces and foreign divorces would invite grave constitutional objection. (See *Estin* v. *Estin*, *supra*.)

time was required to elapse before she could qualify to bring a martimonial action. Put another way, in June 1953, she was divorced in Nevada by virtue of constructive service alone while a wife resident in New York. New York's law, not California's, therefore, must be examined to determine her marital status, whether "unitary" or "divisible."

Given the validity of the statute, we may turn now to its applicability to this case. The husband contends that the statute, apart from legislative power, and as a matter of interpretation, necessarily implies that there must have been a matrimonial domicile in New York before relief may be obtained under it. There is nothing in the language of the statute to require it. Moreover, there had been proposed legislation which would have made such a requirement, but it was never adopted (1948: Sen. Int. No. 2366, Pr. No. 2611). There are many good reasons which may be suggested for omitting such a requirement. But that policy question is for the Legislature and not the courts to decide. It suffices that the legislative power exists, once the concept of "divisible divorce" is accepted, and there is nothing to sustain the suggested narrower interpretation.

It is also argued that the wife in this case is not a "New York wife" and that the statute was designed only to assist a "New York wife." But, again, given the concept of "divisible divorce," she is a wife—still—for the purpose of obtaining enforcement of the husband's *in personam* financial obligations. The wife in this case is in New York and has been for the required one year. It is important too that she came here still undivorced.* Thus the statutory requirements for standing to sue are satisfied. But, all this

* If she had come to New York already divorced, it might be necessary to consider whether under the law of California, the state of the last actual marital domicile, any economic marital obligation survived the out-of-state constructive service divorce, and if so, what effect should be given in New York to such survival.

does not mean our remedies should be available to migrant spouses for the purposes of lawsuits, indiscriminately.

The phrase "as justice may require," like similar language in section 1170-a of the Civil Practice Act, is designed not to create a right as of course. Rather, these words confer power and obligation upon a court of jurisdiction to render directions that serve the public policy of the state and protect its residents in proper cases. It may not be perverted to make of New York a center for migrant wives to litigate matrimonial issues that belong or may be barred elsewhere. In such cases our courts would refuse to grant relief under the rubric in the statute "as justice may require."

In applying the statutory standard, a distinction should be made between an actual matrimonial domicile, established by intent of persons living together in permanent residence, and a constructive marital domicile, which arises when a wronged wife is entitled to establish the marital domicile wheresoever she will. In any matrimonial action the wife, of course, will have to establish a matrimonial domicile of the one kind or the other. That proposition is, therefore, equally true with respect to assertion of a right to relief under this statute. Where there has been an actual matrimonial domicile in New York, it is easier to satisfy the statute. If there is no actual matrimonial domicile in New York, then it will be incumbent upon the wife to establish other equally significant circumstances before she merits relief under the statute. In this case there was no actual matrimonial domicile in New York, but there are other circumstances which suggest that discretion may be exercised in the wife's behalf.

The husband in this case is a man of many residences, temporary and permanent. His wealth and occupation give him the opportunity, open to very few, to select any one of several domiciles. This makes tenuous the relationship that this couple had to any particular domicile or residence

during the four years of their marriage. Moreover, the couple frequently sojourned at the maternal home in New York City. In fact, there were particular rooms in his mother's home that were repeatedly used by the couple when in New York. The bulk of the husband's sources of income has a situs in New York. The wife, on the other hand, is supposedly destitute and is receiving welfare assistance through the City of New York. There is enough in the record from which to infer that in this matrimonial litigation, now in its fourth or fifth action or proceeding, the husband's legal headquarters are in New York. Very telling is the fact that during the marriage, according to the wife's uncontradicted testimony, she received a monthly $1,300 check from the husband's mother, in New York, for the maintenance of the household. These circumstances spell out a nexus with New York. They also negate exclusiveness of residential relation between the married couple and, say, California, or even Nevada.

Indeed, as one views the facts in this case, it is seen that the husband's ties with New York are great. His family roots and family wealth are here. It is from New York, while they lived in marriage, that the couple obtained their basic income and support. The husband's domicile may vary, but the economic and family tie to New York is persistent. It is here that his wife may alone have effective remedy against his assets. It was not unnatural or sinister for her to come here. For the purpose of enforcing the husband's economic obligation there is interest and jurisdiction in New York enough—the more so now that the wife is a public charge in this state. Accordingly, the wife, in addition to having established residence here before the divorce, and the constructive matrimonial domicile, has also sufficiently established contacts with New York to merit relief under section 1170-b.

The husband makes the point that Special Term did not

make a finding that he was a wrongdoer. Clearly, before maintenance may be ordered under section 1170-b, a wife must establish all the elements of one of the standard matrimonial causes of action. The difference is that she is not barred from relief by a divorce decree obtained on constructive service. The wife testified at length and was cross-examined about acts of cruelty—mental and physical—committed by the husband, and that in, September, 1952, he abandoned her. Special Term in its opinion found that the husband failed and refused to support the wife, and returned to the state of Nevada for the purpose of reestablishing his domicile and instituting a divorce action against the wife. If added findings with respect to the issue of cruelty are necessary there is sufficient in the record to permit such addition, and it may be effected in the settlement of the order herein.

On the wife's appeal from the finding that the Nevada divorce was valid, there is little substance. Defendant husband supplied ample evidence that he had resumed his domicile in Nevada. This was a case of a man resuming a domicile that he had had for a number of purposes for twenty years before his marriage to this plaintiff. What motivates a man's change in domicile is not important, once it becomes clear that he in fact has effected the change.

On the issue of the husband's special appearance in the action, it is quite evident that he interceded in the action to contest by cross-examination some of the substantive issues on the merits. But the language of section 237-a of the Civil Practice Act, enacted in 1951, allows precisely that, once Special Term had overruled his objection with leave to raise the defense in his answer. By virtue of the statute he had the opportunity to defend on the merits without jeopardizing his position to raise on appeal the jurisdictional issues tendered. Even though he failed to sustain on appeal his attack on the court's jurisdiction

over his person, he is not subject to an *in personam* judgment.* In recommending enactment of the new section 237-a the Judicial Council evidently did not contemplate that effect nor, apparently, did it contemplate the situation that has arisen in this case. (See 16th Annual Report of the N. Y. Judicial Council (1950), p. 185 et seq.; 17th Annual Report of the N. Y. Judicial Council (1951), pp. 58-64.) It would seem, however, the fairer practice to permit parties to rely on the language of the statute as it now appears, and if there is to be any limiting of the effect of the wording of the statute it should be done legislatively.

With regard to the allowance made for maintenance and for counsel fees, they are deemed adequate and justified by the record.

Accordingly, the judgment should be affirmed in all respects, with costs to plaintiff. Settle order.

BASTOW, COX AND BERGAN, *JJ.*, concur.

PECK, *P. J.*, dissents in a dissenting opinion.

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* What the situation would be in a truly *in rem* action it is not proper or necessary to determine in this case.

Dissenting Opinion

SUPREME COURT

APPELLATE DIVISION — FIRST DEPARTMENT

October, 1955.

David W. Peck, *P.J.*,
Charles D. Breitel,
Earle C. Bastow,
Joseph A. Cox,
Francis Bergan, *JJ.*

9419-9420

PATRICIA W. VANDERBILT,
Plaintiff-Respondent,

vs.

CORNELIUS VANDERBILT, JR.,
Defendant-Appellant,

and

THOMAS F. McCOY,
Receiver and Sequestrator-Respondent.

PECK, *P.J.* (dissenting):

I am unable to concur with the majority of the court as to the constitutionality of Section 1170-b of the Civil Practice Act. As I read the decision of the Supreme Court in *Estin* v. *Estin*, 334 U.S. 541, it turned upon the existence of previously established property rights under a New York

judgment. The court held that the Nevada decree did not wipe out the wife's claim for alimony under the New York judgment. It does not follow that the state of the wife's domicile may, subsequent to a valid divorce obtained by the husband in another state, create new alimony rights upon some theory of retaining a continuing and surviving legal or economic interest in the wife's status or support.

Also, I am unable to see how Section 1170-b would be made applicable to cases where the divorce was granted in the State of New York. If it is not so applicable, it is discriminatory and violative of the constitutional provision respecting the equal protection of the law.

I therefore dissent and vote to strike from the judgment those provisions which are bottomed upon Section 1170-b of the Civil Practice Act.

Opinion of the Supreme Court, New York County (Dismissing Complaint)

SUPREME COURT

SPECIAL TERM — PART IX.

By MR. JUSTICE DI FALCO

1/14/55

Vanderbilt v. *Vanderbilt*.—The first affirmative defense interposed by the defendant to this complaint for a legal separation is the fact that the defendant obtained a final decree of absolute divorce from the plaintiff on June 30, 1953, in the Second Judicial District Court of the State of Nevada, in the County of Washoe. That decree is in evidence.

Plaintiff seeks to impeach the bona fides of the defendant's domicile in Nevada, thereby attacking the validity of the Nevada decree.

Under the holdings of the United States Supreme Court in the well-known case of *Williams* v. *North Carolina* (317 U. S.), and the line of cases following in accord, including our own Court of Appeals, in the *Matter of Holmes* (291 N. Y.), and cases thereafter also in accord, it has been firmly established that a decree of a sister state is entitled to and must be given full faith and credit here, unless the party assailing the validity of such domicile upon which the decree is founded adduces proof sufficient to satisfy the court of this state that such domicile was false and constitutes a fraud upon the decreeing court.

The burden of proof in this respect is upon the person who assails the validity of that decree, and in this case, of course, is upon the plaintiff.

Firmly established is the fact that the validity of the decree being recognized as a valid decree of a court of competent jurisdiction of a sister state, the burden of proof to set this decree aside rests heavily upon the plaintiff.

Plaintiff contends that the defendant has not established a residence of any particular place in any state, but that he established one to suit his own convenience at the moment, and shifted from place to place.

In my opinion the proof presented by plaintiff to disprove the bona fides of the defendant's domicile in Nevada upon which his decree is bottomed is totally lacking in probative force and weight. Plaintiff's proof is meager, and has failed to meet the burden of proof required of her to establish by a preponderance of credible evidence that the defendant was not a bona fide resident of the State of Nevada at the time he obtained his decree of divorce there, or that he had not complied with the necessary requirements with respect to the laws of that state.

Implicit in the decree of Nevada is the finding of the jurisdiction of the person and subject matter of the proceeding, the validity thereof, and the compliance of the defendant with all the legal requirements of that state.

Furthermore, the additional testimony and documentary evidence presented now before me on behalf of the defendant establishes his residence and domicile in the State of Nevada for some period in years preceding the obtaining of his divorce there. We have the evidence of his tax returns, voting records for years, automobile registration and the renewals thereof in the State of Nevada, and furthermore of his apartment and business connection there and other businesses, the fact that he resided there before his marriage to the plaintiff, and that he has consistently over the years stated at various times and shown intent that Nevada was his place of domicile.

It is apparent from the proof that many years prior to his marriage to the plaintiff the defendant had planted his "grass roots" in Nevada, and continued this conduct to a great extent even after his marriage, though he led a life of a much and varied traveller in his work and business and other activities.

Upon his break with the plaintiff the defendant returned to his old "stamping ground". This was not a new and strange territory or jurisdiction or a new haven sought for the purpose of establishing a colorable residence for the securing of a divorce as is claimed by the plaintiff.

Upon the record as it stands before me I find and decide that the plaintiff has failed to factually overcome the presumption of the validity of the defendant's Nevada decree, has failed to present any proof of probative force, and has not met or sustained the burden of proof required.

The first affirmative defense of the defendant, therefore, is a bar to the plaintiff's action for a separation, and, being sustained, the complaint bearing on this issue must be dismissed upon the merits.

In this respect this constitutes the opinion of the court pursuant to section 440 of the Civil Practice Act.

However, pursuant to the provisions of the statute, particularly and specifically section 1170-b of the Civil Practice Act, in cases such as this made and provided, I will take the proof from both parties as to their incomes and earnings and such other information as may be required and pertinent in connection with the issue of maintenance and support to be awarded, if any, to the plaintiff.

Opinion of the Supreme Court, New York County (Awarding Maintenance)

SUPREME COURT—SPECIAL TERM

PART IX

By Mr. Justice Di Falco 2/18/55

Vanderbilt v. *Vanderbilt, Jr.*—This is an action by the plaintiff against her husband for a separation on the grounds of cruelty, abandonment and non-support. Defendant interposed, as an affirmative defense constituting a bar to this action, a final decree of absolute divorce which he obtained from plaintiff on June 30, 1953, in the State of Nevada. Plaintiff challenged the bona fides of defendant's domicile in Nevada, thereby attacking the validity of that decree. The evidence of the parties was taken in respect thereof and, at the conclusion of that phase of the case, I rendered my decision (N. Y. L. J., January 17, 1955). The decision is herein incorporated by reference. I found for the defendant and dismissed plaintiff's complaint on that issue, namely, that the Nevada decree constituted a bar to plaintiff's action for separation.

However, though her action has been dismissed for the reasons stated, plaintiff makes claim for maintenance pursuant to the provisions of section 1170-b of the Civil Practice Act. Accordingly, the proof of the parties was taken as to their finances, income, and plaintiff's needs, in the event I resolve this issue of maintenance in her favor. Section 1170-b is a statute of recent enactment (L. 1953, chap. 663, April 13, 1953). The present action appears to be the first of its kind in respect of the issues raised as to the validity, application and constitutionality of the statute. The precise question has not as yet been squarely deter-

mined in any discovered decision of our courts. In view of the novel and legal issues presented, a study and analysis of the statute, its background and origin, is necessary. Defendant contends that section 1170-b may not lawfully be applied to the facts as are here presented and, in any event, contends the statute is unconstitutional.

The facts adduced at the trial before me are the following: The parties were married in Connecticut in September, 1948; at the time of the marriage defendant was domiciled in Nevada and plaintiff was domiciled in California; a few months after the marriage the parties became jointly domiciled in California. They separated in September, 1952. Plaintiff, in October, 1952, commenced a prior separation action against defendant in this court, which was dismissed by order of this court dated February 27, 1953, on the determination that plaintiff, as of October 1, 1952, had not resided continuously for one year in the State of New York before the commencement of that action. Thereafter, the defendant procured a decree of absolute divorce against plaintiff on June 30, 1953, in Nevada. That decree was obtained ex parte and plaintiff did not appear or answer therein. Plaintiff thereafter, still continuing her residence and domicile in the State of New York, commenced this present action for separation against the defendant; her complaint is verified April 5, 1954, and avers that plaintiff was a resident continuously for more than one year prior to the commencement of the action (sec. 1165-a, subdiv. 3, C. P. A.); plaintiff was therefore a resident of this state at the time of the effective date of section 1170-b; defendant was served by order of publication herein, and, on the same date that the order for publication was made, an order or sequestration was granted herein, directing the seizure by the receiver named of defendant's property within the State of New York; the receiver thereupon acquired custody and control of moneys and property of the defendant and is still holding such property and moneys. Pending the pub-

lication aforementioned, defendant, on April 30, 1954, appeared specially herein and moved to dismiss this action for lack of this court's jurisdiction over his person and of the subject matter of the action, and further, to vacate the order of sequestration, which motion was denied in all respects; thereafter, on July 1, 1954, defendant interposed his answer preserving his special appearance and objections to the jurisdiction of this court over his person and the subject matter herein. Plaintiff moved for an award of alimony and counsel fee pendente lite, which was denied to the extent of the alimony but allowed a counsel fee of $2,500 (further reference to the award will be hereinafter made). The trial proceeded before me; the validity of defendant's Nevada decree was not successfully attacked by plaintiff. I then, as aforestated, took proof upon plaintiff's application for maintenance pursuant to section 1170-b. One of the issues raised by defendant is whether or not, upon the facts adduced, plaintiff comes within the application of section 1170-b. Did the Legislature intend this statute to cover a factual situation such as is presented by plaintiff? In my opinion, the statute is framed in unambiguous language and appears to be clearly applicable to plaintiff. It reads as follows: "§1170-b. *Maintenance of wife where divorce or annulment previously granted on non-personal jurisdiction.* In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary

or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this section shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter."

Defendant contends (1) that this is not a proper case to which section 1170-b applies because plaintiff completed her one year of legal residence in this state (sec. 1165-a, subdiv. 3 C. P. A.) after section 1170-b was enacted and after a valid divorce was obtained by the defendant; (2) that neither party had a marital domicile here in the State of New York and that plaintiff is not a "New York wife" intended by the Legislature to be protected by this statute; and (3) that, in any event, section 1170-b is unconstitutional for the reasons that it discriminates against foreign divorces and denied the defendant, a non-resident, protection of the laws equal to that afforded New York husbands.

The starting point in this discussion must necessarily be to consider the Legislature's intent when it enacted section 1170-b. I have had occasion to discuss inquiry into legislative intent, in the case of *Art Steel Co.* v. *Velazquez* (201 Misc., 141; aff'd 280 App. Div., 76), at page 144, as follows: "The intent with which statutes are enacted 'is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and remedy in view' (1 Kent's Commentaries 462; see, also, McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.] sec. 95). Our Court of Appeals has pointed out that courts 'do not merely read the bare end product of the legislative labors' but rather 'read the statute in the light of the state of facts which were found by the Legislature, and which prompted the enactment' (*St. Nicholas Cathedral of Russian Orthodox Church in America* v. *Kedroff*, 302 N. Y., 1, 31); and that 'statutes, directed against known and stated evils, are not to be

stretched to cover situations having no regard or reasonable relation to those evils' (*Metropolitan Life Ins. Co.* v. *Durkin*, 301 N. Y., 376, 381)." I turn, therefore, to a study of the background of the statute in question to ascertain the objects and remedies which prompted the Legislature of the State of New York to enact section 1170-b of the Civil Practice Act.

It is now well established, since the decision of the United States Supreme Court in the second case of *Williams* v. *North Carolina* (325 U. S., 226, 65 Sup. Ct., 1092), that under the full faith and credit clause of the Constitution a sister state is required to give full faith and credit to an ex parte decree of divorce obtained in another state only to the extent that the decree of divorce adjudicated the marital res and marital status of the parties. As a result of this decision experience thereafter proved that sister states were confronted with the problem of providing financial assistance to abandoned wives, in the face of the recognition of a husband's ex parte divorce. Were they to be left helpless by such foreign ex parte decrees? The courts have sought to meet and alleviate the situation by an ever broadening approach and consideration to these legal and social problems. Experience and wisdom have gradually resolved a more realistic approach thereto, whittling away at former old-fashioned legalistic barriers. It is obvious today, in the light of more broadened decisional law, that the judicial process, working itself through the constant, ever-changing problems presented, is making decided headway in solving the dilemma of the Bench, Bar and legal writers in this field of law. In this evolution of the law our United States Supreme Court recently evolved and enunciated the principle that a divorce decree obtained in a sister state, where the wife was not present and who had not been served with process in that state, and who did not appear

in that action, need not be given full faith and credit to the extent of relieving the husband from his obligation to support his wife, although that decree may be valid to dissolve the marital status of the parties. These principles are now firmly established by the cases of *Esenwein* v. *Esenwein* (325 U. S. 279, 65 Sup. Ct., 1118), *Estin* v. *Estin* (334 U. S. 541, 68 Sup. Ct., 1213), and *May* v. *Anderson* (345 U. S., 528, 73 Sup. Ct., 840). In the *Estin* case (*supra*) the husband's argument that his obligation to support his wife terminated with the legal dissolution of the marriage as soon as the relationship of husband and wife no longer existed was answered in the majority opinion at pages 1217 to 1218, as follows: "New York was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge. The problem of her livelihood and support is plainly a matter in which her community had a legitimate interest. * * * The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each state to the matters of her dominant concern."

Mr. Justice Douglas, who wrote the majority opinion in the Estin case, also wrote the prevailing opinion in the first Williams case (317 U. S., 287, 63 Sup. Ct., 207) and wrote a concurring opinion in the Esenwein case (supra) where he pointed out that it was important to preserve the basic distinction between the concept of marital capacity and the concept of support for the wife, and that the Williams case involved only the issue of marital capacity. At page 1119 of the Esenwein case we find the following: "We held in Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273, that a Nevada divorce decree granted to a spouse

domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse who obtained the Nevada decree was being prosecuted in North Carolina for living with the one woman who Nevada recognized as his lawful wife. Quite different considerations would have been presented if North Carolina had merely sought to compel the husband to support his deserted wife and children, whether the Nevada decree had made no provision for the support of the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree." Mr. Justice Douglas continued (pp. 1119-1120): "It is one thing if the spouse from whom the decree of divorce is obtained appears or is personally served (See Yarborough v. Yarborough, 290 U. S. 202, 54 S. Ct. 181, 78 L. Ed. 269, 90 A. L. R. 924; Davis v. Davis, 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, 118 A. L. R. 1518). But I am not convinced that in the absence of an appearance or personal service the decree need be given full faith and credit when it comes to maintenance and support of the other spouse or the children (see Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565). The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two states. * * * The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States (see Williams v. North Carolina, supra). One must give way in the larger interest of the federal union. But the same conflict is not necessarily present when it comes to maintenance and support. The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a big-

amist and the offspring of his second marriage are not bastardized."

The New York State Law Revision Commission confronted with the problem presented conducted a very thorough and exhaustive inquiry and analysis of these precedents and enunciations of the statutes and decisional law of the courts. The commission prepared a very comprehensive report wherein it recommended the enactment of the new statute—1170-b of the Civil Practice Act. It would be unnecessary and burdensome to repeat either in hæc verba or even in resume the report (Legislative Document [1953], No. 65[k]), but at page 6 thereof it is stated: "The Commission believes that legislation is necessary to protect a New York wife whose right to support from her husband may now be completely cut off by an ex parte foreign divorce decree, in the absence of a previous New York separation decree with provision for maintenance. In order to avoid discrimination against foreign divorces, against which the *Estin* opinion warned, such legislation should be made applicable whether the husband's ex parte adjudication of marital status was obtained in a foreign court or a New York court. The Commission therefore recommends that the Civil Practice Act be amended by the addition of a new section 1170-b * * * ."

The report analyzes the case of Estin v. Estin (supra), which pointed out the injustice to a New York wife whose husband obtained a divorce in another state in an ex parte proceeding, and stated, that unless she had been able to get a separation order with maintenance, prior to the foreign divorce, she has no remedy. The report further emphasizes the following: That under the Civil Practice Act, maintenance of the wife may be granted only as an incident to relief in a matrimonial action, and since 1883 it has been accepted law that there is no inherent power in the Supreme Court to grant maintenance to a wife independent of sta-

tutory authority (Ramsden v. Ramsden, 91 N. Y., 281), that (Report, p. 5) an order for maintenance of a wife, after a foreign divorce decree, is not obtainable in the Domestic Relations Court of the City of New York (Domestic Relations Court Act, secs. 91, 137; Adler v. Adler, 192 Misc., 933, 81 N. Y. S., 2d 797 [Dom. Rel. Ct. 1948]); and, furthermore, that by the recent amendment to the Civil Practice Act, section 1170-a, the Supreme Court was authorized to render judgment with respect to the custody and maintenance of children where divorce, separation, annulment or a declaration of nullity of a void marriage has been denied for any reason other than a lack of jurisdiction; that the legislation proposed (sec. 1170-b) complements section 1170-a by extending similar protection to wives and the relief will be enforceable in the same manner as in any other matrimonial action (report, p. 5).

Of decided further interest on the subject is the portion of the report (p. 12) in respect of the situation in our Domestic Relations Court. It is pointed out that in the case of *Adler* v. *Adler* (*supra*) a petition was filed in the Domestic Relations Court by a wife whose husband had obtained a valid foreign divorce decree, apparently ex parte, wherein she sought support under the Domestic Relations Court Act. The petition was "regretfully" dismissed for lack of a New York judgment prior to separation. Such a prior judgment has been held in the Domestic Relations Court to be within the protection of the Estin rule by one justice of that court (*Gittelman* v. *Gittelman*, 192 Misc. 334, 80 N. Y. S. 2d 695) and denied by another ("*Morton*" v. "*Morton*," 99 N. Y. S., 2d 155) in view of the language of section 137 (1) of the Domestic Relations Court Act.

The holdings thus indicate the basic difficulty in our court is that statutory authority is lacking to grant alimony except pursuant to the matrimonial actions specified in the Civil Practice Act (secs. 1140, 1155, 1164, 1169-70), and

since the oft-cited case in 1883 (Ramsden v. Ramsden, supra) it has been accepted law that there is no inherent power in the Supreme Court to grant support for the wife. Further, at page 13 of the report, it is stated: "Since, therefore, the Children's Court Act does not authorize support for wives generally, the Domestic Relations Court can order support only for wives who have not been divorced, and the Supreme Court is limited to statutory actions, none of which authorize support for a spouse whose marriage has already been dissolved by a foreign decree, the New York courts do not appear to have jurisdiction to compel support despite a valid foreign divorce decree."

With this background and collation of decisional law presented by the commission showing the need for affirmative legislation on the subject, our Legislature thereupon enacted section 1170-b of the Civil Practice Act. As stated at page 3 of the report: "Its purpose is to authorize the Supreme Court to provide for the maintenance of a wife where the husband had previously obtained a divorce, annulment, or a declaration of nullity of a void marriage from a court which did not have jurisdiction over her person."

I am convinced that plaintiff comes within the purview and protection of this statute. She has been a domiciliary and resident of this state for more than a year prior to the commencement of this suit (April 5, 1954). She was, therefore, a resident at the time of the effective date of section 1170-b (April 13, 1953) and entitled to bring this action under section 1165-a (3) of the Civil Practice Act. Defendant procured his ex parte divorce in Nevada on June 30, 1953. Concededly, plaintiff was not served in Nevada and did not appear or answer in that action. The present dismissal of plaintiff's separation action was made, as I pointed out, solely by reason of the bar of defendant's prior Nevada decree which was not here successfully challenged by plaintiff. In view of the report and recommenda-

tions of the Law Review Commission for the enactment of section 1170-b of the Civil Practice Act, I am persuaded that the language of the statute clearly encompasses plaintiff. Defendant's contention that the statue will induce wives in foreign states to come to New York State to take advantage thereof, is not merely fallacious, it is completely without basis and untenable. The situation, if ever it proved of such consequence as to require remedy, would, of course, necessarily be the subject of legislative attention—not of the court. The present enactment is, in my opinion, clear and unambiguous. If the Legislature had other intentions, it could have clearly provided therefor and specified, as a requisite to relief under the statute, a period of residence or other requirements in this state by a wife prior to her suit in the face of the ex parte foreign divorce decree obtanied by her husband. The matter of discrimination was covered in the recommendations of the Law Review Commission, and, with that before it, I cannot but conclude that the Legislature intended this statute to apply to ex parte adjudications rendered in New York courts as well as those obtained in foreign courts. Defendant's attack on the constitutionality of the statute is rejected. The constitutionality of section 1170-b, in effect, was predetermined by the United States Supreme Court in the decisions hereinbefore referred to, where in the doctrine of divisible divorce is enunciated. Section 1170-b is a New York State codification of that doctrine in our statute law, and the incorporation thereof is a part of the public policy of this state.

It is further significant to note the following language in *Morton* v. *Morton* (199 Misc., 547), at page 557: "Doubtless it would be consonant with the full faith and credit clause and within the New York State constitutional power of the Legislature to have enacted the bill, introduced and killed at the 1948 session (Sen. Int. No. 2366. Print No.

2611), which would have added to the Civil Practice Act a new section to provide that 'when the last joint matrimonial domicile was within the State of New York, and the husband acquires domicile or residence outside of the state and obtains a valid separation or divorce decree and the wife neither appeared nor was served in jurisdiction thereof, the wife shall have a cause of action for support and for education and maintenance of the children of the marriage.' "

This statute, containing specific restrictions was defeated. The bill as eventually passed (sec. 1170-b, C. P. A), is a much broader, all-inclusive statute, with no limitations or restrictions whatever. It embraces plaintiff. Defendant argues that plaintiff does not come within the application of the statute because both parties are not domiciliaries of this state, or that plaintiff is not a domciliary of the state, and that the statute applies only to New York domiciliaries where the marital domicile was in this state and the husband had departed therefrom. I am not disposed to accept defendant's narrow construction of section 1170-b. His argument is without basis in the record. The facts are established that, although the parties had been married in Connecticut, that was neither the domicile nor residence of defendant or plaintiff. Their mode of life was one of constant luxurious t avel, with periodic places of residence or domicile. They took up a short residence or domicile in California after the marriage. There is proof in the record that at one time these parties had looked for an apartment in New York. I cannot subscribe to defendant's argument that plaintiff may not achieve her own domicile or residence in any state she chooses, after the separation of the parties under the circumstances and facts disclosed. My conclusion is not overcome by the arguments of defendant which ignore the factual situation presented by plaintiff. Plaintiff had as much right to estab-

lish a domicile or residence here, which she did, as did defendant in Nevada. Defendant failed and refused to support plaintiff, and returned to the State of Nevada for the purpose of re-establishing his domicile and there instituted his divorce action against plaintiff. She was not obligated to follow and pursue defendant to Nevada. Plaintiff had lived here before, had been living here for a period of time when separated from defendant, and she met the legal requirements for the institution of this separation action. Moreover, as heretofore pointed out, defendant's motion to dismiss this separation suit, on the ground plaintiff was not a resident, was denied.

I am of the opinion, therefore, that plaintiff is entitled to maintenance pursuant to the provisions of section 1170-b. By reason of the order of sequestration, this court may grant plaintiff allowances for her maintenance and counsel fees out of the funds and property seized and held by the receiver (*Matthews* v. *Matthews*, 240 N. Y., 28; *Geary* v. *Geary*, 272 N. Y., 390).

Coming now to the amount of the maintenance to be awarded, it is undisputed that, except for a small amount, plaintiff has not received any support or maintenance from the defendant during the pendency of this action nor since the parties have been separated. It is further undisputed that plaintiff is presently receiving the sum of $400 monthly from a charitable institution and that is her sole means of income and support. She is ill and has with her a minor child of a previous marriage. The sum to be awarded this plaintiff is not to be measured or circumscribed by the amount of the charitable aid she received. Section 1170-b does not present any new or different standard for making an award to a wife for her maintenance. Defendant's contention that section 1170-b "wholly fails to provide any standard or measure for the amount of maintenance allowable" is without merit. The standard of maintenance, it

appears, is an amount "as justice may require." Section 1170 of the Civil Practice Act provides for the support and maintenance of a wife who obtains a judgment of separation or divorce against her husband and states, in the same words as are used in section 1170-b, that the court may grant such maintenance and support for the wife "as justice requires." Despite defendant's contention, plaintiff is not in the same category as a wife whose marriage has been annulled. Plaintiff's rights are the same as they were before the defendant procured his Nevada decree of divorce. The distinction between plaintiff's status and that of a wife whose marriage has been annulled is that, in the case of the annulment, the decree adjudicates that there never had been a valid marriage from its very beginning, whereas in the plaintiff's situation there was a valid marriage and defendant's obligation to support plaintiff survived the ex parte Nevada divorce decree. Since plaintiff's right to maintenance has not been affected by the Nevada decree and is fully protected by section 1170-b, plaintiff is entitled to an award for her maintenance. I hold as being without merit defendant's argument that plaintiff may be awarded only such sum, if any, as will prevent her from becoming a public charge. Nor do I feel that plaintiff is entitled to be maintained in the standard of luxurious life and travel which she enjoyed while married to defendant. She is no longer privileged or required, as she was while married to defendant, to accompany him on his extensive trips and voyages, his lavish entertainment and mode of living, all of which necessitated large expenditures for clothes, traveling, hotels, entertainment, as more fully testified to by plaintiff and described in the record. Neither of these extremes is the test to be now applied. In my opinion, in light of the record before me, plaintiff is entitled now to maintenance in such amount "as justice requires." Studying the report of the law revision commission, I find the words "maintenance" and "support,"

as used throughout, have the same connotation; they are used interchangeably and no different meaning is either ascribed, stated or implied. Funk & Wagnalls New Standard Dictionary defines the words as follows: "*Maintenance:* 1. The act of maintaining, in any sense; as, maintenance of a family; * * * 2. that which supports or sustains; means of support * * *." "*Support:* * * * 3. To supply means for the maintenance of; furnish with what is needed; provide for; as, to suport * * * a family. * * * Syn. bear, carry, * * * maintain. * * * To maintain is to keep in a state or condition, especially in an excellent and desirable condition * * *. To *support* may be partial, to *maintain* is complete; maintain is a word of more dignity than support. * * * 2. That which supports, maintains or upholds. * * * 3. One who or that which furnishes a livelihood to a person or family; a source or means of living; also, subsistence; sustenance; living. 4. A maintaining in continuance * * *."

The evidence established defendant's income and financial status to be substantial. He is the beneficiary of the income of several trusts, the particulars of which are more fully stated in the record. Furthermore, defendant enjoys additional income from his lectures and writings.

In view of the foregoing, I find and decide that plaintiff is entitled to maintenance in the sum of $250 weekly, and to an additional counsel fee of $3,500 which includes expenses incurred. The order of Special Term stated that the allowance there of counsel fee was made "without prejudice to a review at the trial of this cause, of the nature, extent and reasonable value of the services heretofore rendered and hereafter to be rendered by plaintiff's counsel in this action, and to the making of an additional allowance therefor if, at that time, the court deems it proper * * *." The services of plaintiff's attorney were necessary. The amount previously awarded proved inade-

quate. Plaintiff's counsel testified that, of the sum of $2,500 awarded, he incurred expenses of approximately $1,500. Defendant argues that, since plaintiff is an unsuccessful litigant, her complaint having been dismissed, she is not entitled to a counsel fee. Plaintiff's separation was denied solely by reason of the bar of defendant's ex parte Nevada decree. This action is brought both for separation and maintenance. The denial of the separation did not terminate this action, for it continued in respect of plaintiff's application for maintenance and the determination of her right to maintenance under the statute discussed, both in law and in fact.

This constitutes the decision of the court pursuant to section 440 of the Civil Practice Act.

Settle judgment accordingly.

Opinion of the Supreme Court, New York County (Denying Preliminary Motion to Dismiss)

SUPREME COURT, NEW YORK COUNTY

SPECIAL TERM, PART III

30672—1954

PATRICIA W. VANDERBILT,
Plaintiff,
against
CORNELIUS VANDERBILT, JR.
Defendant.

Special Term Part 3, Jun 16, 1954
Received from Justice

McNALLY, J:

In an action for a separation the defendant moves before answer for an order dismissing the complaint and vacating an order of sequestration dated April 21, 1954, and an order of publication dated April 26, 1954, as well as the proceedings consequent on said orders. The grounds for this application are lack of jurisdiction of the subject matter of the two causes of action alleged in the complaint and lack of jurisdiction over the person of the defendant; a valid decree of divorce rendered in the Second Judicial District Court of the State of Nevada, County of Washoe, antedating the commencement of this action, and the violation of federal constitutional rights of the defendant by the commencement of this action.

The complaint alleges that the plaintiff, Patricia W.

Vanderbilt, is and has been for more than one year prior to the commencement of the action in April, 1954 a resident of this state. Two causes of action are alleged which, if established, will sustain a separation by reason of cruel and inhuman treatment, and abandonment against the defendant, Cornelius Vanderbilt, Jr.

The order of sequestration is grounded on the allegation that the defendant is not and cannot be found within the State of New York. The defendant does not dispute his absence from the State of New York.

Prior to the commencement of this action and on or about October 1, 1952, the plaintiff instituted an action for separation against the defendant which terminated in an order of dismissal dated February 27, 1953. The said order confirmed the report of a referee which found in respect of the first action (1) that the plaintiff and defendant were not residents of this state when it was commenced and that neither the plaintiff nor the defendant had been a resident of this state for at least one year continuously at any time prior thereto. This action was commenced during April, 1954. The order made February 27, 1953, in the first action does not preclude proof of the allegation presently made by the plaintiff that she has continuously for more than one year prior to the commencement of this action been a resident of this state. Proof of the latter allegation will sustain the plaintiff's right to prosecute this action under section 1165-a, Civil Practice Act.

The Nevada decree of divorce relied on by the defendant is an *ex parte* decree. It has no vitality in this state until made a judgment here (*Williams v. North Carolina*, 325 U.S. 226, 229); hence plaintiff was not required to anticipate its assertion. It is entitled to full faith and credit under Article IV, section 1, of the United States Constitution provided the defendant was domiciled in Nevada at the time it was rendered. The issue of domicil,

however, may be re-examined and determined in this action without violating the faith and credit required under Article IV (*Williams* v. *North Carolina, supra*). Plaintiff's affidavits dispute the defendant's domicile in the State of Nevada at the time he procured his decree in that State. It is obvious that if the defendant herein asserts the Nevada decree as a bar to this action, issue will be joined on the question of the defendant's domicil at the time the decree was rendered.

The defendant also contends that in the event the Nevada decree is accorded full faith and credit by this court, then the plaintiff intends to assert rights grounded on section 1170-b of the Civil Practice Act, which provides as follows:

> "§ 1170-b. Maintenance of wife where divorce or annulment previously granted on non-personal jurisdiction. In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this section shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter."

Plaintiff does not deny that she may rely on section 1170-b of the Civil Practice Act. It is the purpose of section

1170-b to extend the principle of *Estin* v. *Estin*, 296 N.Y. 308, affd. 334 U.S. 541, to a wife who is not fortified with a judgment for maintenance and is precluded from relief in an action for divorce, separation, or annulment by reason of an *ex parte* foreign decree entitled to full faith and credit by the courts of this state adjudicating the nullity of the marriage (see Legislative Document [1953] No. 65[K] of Law Revision Commission). Although the *Estin* case recognized the concept of a divisible divorce thereby enabling recognition of the force and effect of a foreign *ex parte* decree on the marital status and preserving the *in personam* decree for maintenance awarded by a court of this state, it would appear that the divisibility there recognized rests largely, if not entirely, upon the fact that the obligation to support decreed by the New York court had been finally adjudicated prior to the foreign *ex parte* decree of divorce. Section 1170-b makes available to a New York wife entitled to a divorce, separation, or annulment, except for the operation of an *ex parte* foreign decree severing the marriage, the rights of a wife in possession of a New York decree providing for her support, antedating the foreign *ex parte* marital decree.

The constitutional grounds relied on by the defendant assume the application of section 1170-b and that its effect is to impair constitutional rights of the defendant. On this motion, however, we do not reach the constitutional questions since they can only arise if the plaintiff comes within section 1170-b, which for its application requires a finding that the prior *ex parte* divorce decree is the basis for the refusal on the part of this court to grant the relief sought by the plaintiff in this action. If this court should find that the Nevada decree is not entitled to full faith and credit by virtue of lack of domicil on the part of the defendant at the time of its rendition, then the foundation for the arguments based upon the violation of the defendant's constitutional rights will have been destroyed. We

find, therefore, that the grounds relied on for dismissal rest upon issues of fact which may not be resolved on this application. Under the circumstances, however, and in the exercise of its discretion, the court will allow the defendant to allege the said facts in his answer (see § 237-a, Civ. Pract. Act, subd. 3[c]).

The defendant has failed to establish he is entitled to a *vacatur* of the orders of sequestration and publication. Accordingly, the motion is in all respects denied, with leave to the defendant to answer the complaint within twenty days after service of a copy of this order with notice of entry thereof.

Dated, June 16, 1954

J. McN.
J.S.C.

FILED
JUN 16, 1954
NEW YORK CO. CLERK'S OFFICE

Sec. 1170-b. Maintenance of wife where divorce or annulment previously granted on nonpersonal jurisdiction.

In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this action shall extend to unpaid

sums or installments accrued prior to the application as well as to sums or installments to become due thereafter.

Added by L. 1953 ch. 663, effective April 13.

Sec. 1165-a. Conditions attached to maintenance of action for annulment or separation. An action to annual a marriage or for separation may be maintained in either of the following cases:

1. Where both parties are residents of the state when the action is commenced.

* * * * *

3. Where the parties were married without the state, and either the plaintiff or the defendant is a resident of the state when the action is commenced, and has been a resident thereof for at least one year continuously at any time prior to the commencement of the action.

Sec. 1166. Residence of married woman in action for divorce or separation. If a married woman dwells within the state when she commences an action against her husband for divorce or separation, she is deemed a resident thereof, although her husband resides elsewhere.

Sec. 1161. (Extract) Action for separation; when maintainable. An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, forever, or for a limited time, for *any* of the following causes:

* * * * *

New York Court of Appeals
Judgment Entered May 31, 1956

No. 39

COURT OF APPEALS

STATE OF NEW YORK, } ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 31st day of May in the year of our Lord one thousand nine hundred and fifty-six, before the Judges of said Court. "

WITNESS:

The HON. ALBERT CONWAY,
Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

Remittitur—May 31, 1956

No. 39

PATRICIA W. VANDERBILT,
Respondent-Appellant,

vs.

CORNELIUS VANDERBILT, JR.,
Appellant-Respondent,

and

THOMAS F. McCOY,
Receiver and Sequestrator-Respondent.

BE IT REMEMBERED, That on the 2nd day of February in the year of our Lord one thousand nine hundred and fifty-six, Cornelius Vanderbilt, Jr., the appellant-respondent, and Patricia W. Vanderbilt, the respondent-appellant in this cause, came here unto the Court of Appeals, by Sol A. Rosenblatt, and Monroe J. Winsten, their respective attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Thomas F. McCoy, receiver and sequestrator-respondent, in said cause, afterwards appeared in said Court of Appeals by Jeremiah M. Evarts, his attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Sol A. Rosenblatt, of counsel for the appellant-respondent, and by Mr. Monroe J. Winsten, of counsel for the respondent-appellant, no appearance for Thomas F. McCoy, receiver and sequestrator-respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs to plaintiff.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs &c, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the

said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, May 31, 1956.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

STATE OF NEW YORK
COURT OF APPEALS

RAYMOND J. CANNON
Clerk

Judgment of Supreme Court, New York County, Entered June 8, 1956 on Judgment of the Court of Appeals

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

JUDGMENT OF AFFIRMANCE

PATRICIA W. VANDERBILT,

Plaintiff,

—against—

CORNELIUS VANDERBILT, JR.,

Defendant.

The above mentioned defendant having appealed to the Court of Appeals from so much of the order of the Appellate Division of the Supreme Court, First Judicial Department, dated December 20th, 1955, and entered in the office of the Clerk of said Court on December 29th, 1955, and from so much of the judgment entered thereon with costs in the office of the Clerk of the County of New York on December 30th, 1955, as affirms with costs that part of the judgment entered in the above entitled action in the office of the Clerk of the County of New York on March 31, 1955, which awards plaintiff maintenance and counsel fees and which directs the payment of the amount thereof by the defendant and by the Receiver and Sequestrator in this action, and which awards plaintiff judgment for costs against the defendant in the sum of $375.30 and which directs the payment of the amount thereof by the

said Receiver and Sequestrator and which may permit continued retention, collection and payment out by said Receiver and Sequestrator of defendant's funds, money, property and other assets, as is stated in his notice of appeal; and plaintiff having appealed to the Court of Appeals from so much of said order of the Apellate Division of the Supreme Court, First Judicial Department, and from so much of said judgment entered thereon in the office of the Clerk of the County of New York as affirms that part of the said judgment entered in the above entitled action in the office of the Clerk of the County of New York on March 31, 1955, which adjudges that the Nevada divorce decree in favor of the defendant is a bar to plaintiff's cause of action for a separation, and which denies to the plaintiff a separation and dismisses that part of the plaintiff's complaint relating to the relief of separation, and which fails to adjudge that jurisdiction of the person of the defendant was acquired in this action and which excludes from said judgment the sixth decretal provision of the plaintiff's proposed judgment, as is stated in her notice of appeal, and the Court of Appeals having heard said appeals, and ordered and adjudged that the judgment so appealed from be affirmed, and judgment be entered for the plaintiff, with costs of said appeals, and the remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of New York, and an order having been entered thereon making the judgment of the Court of Appeals the judgment of this Court, and directing the entry of a judgment of affirmance herein with costs of said appeals to be taxed against the defendant herein,

NOW ON MOTION OF MONROE J. WINSTEN, attorney for plaintiff, it is

ADJUDGED that the judgment of the Appellate Division

of the Supreme Court, First Judicial Department entered herein in the office of the Clerk of the County of New York on the 30th day of December, 1955, be, and the same hereby is, affirmed, and that plaintiff, PATRICIA W. VANDERBILT, recover of defendant, CORNELIUS VANDERBILT, JR., the sum of $95 79/100 costs of said appeals as herein taxed, to be paid by the Receiver and Sequestrator out of the moneys, funds, property and assets which he, as such Receiver and Sequestrator, has received or may become entitled to receive as such Receiver and Sequestrator.

Dated: New York, N. Y.,
June 8th, 1956.

ARCHIBALD R. WATSON
Clerk.

Plaintiff's Address:

230 East 51st Street
New York, N. Y.

Defendant's Address:

First National Bank Building
Reno, Nevada.

FILED
JUNE 8, 1956
NEW YORK
COUNTY CLERK'S OFFICE

Judgment of Supreme Court, New York County, Entered After Trial on March 31, 1955

At a Special Term, Part IX, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House at Foley Square, in the Borough of Manhattan, City of New York, on the 30th day of March, 1955.

PRESENT:

HONORABLE S. SAMUEL DI FALCO,
Justice.

Special Term Part IX
Mar 30 1955
Received from Justice

[SAME TITLE]

This action having been duly brought on by the plaintiff for a judgment in her favor and against the defendant for a separation from the defendant from bed and board forever on the grounds of cruel and inhuman treatment, abandonment and non-support, and also for reasonable provision for the maintenance of the plaintiff out of the assets and income of the defendant; and said action having been commenced on April 21, 1954, by the making of an order for the service of the summons herein upon the defendant by publication, and the summons herein having been duly served upon the defendant herein by publication and otherwise in compliance with the said order for publication, and proof of such service and compliance with said order having been duly filed herein on June 7, 1954; and on April 21, 1954, an order having been made herein duly appointing

Thomas McCoy, Esq., as Receiver and Sequestrator of the property, assets and income of the defendant within the State of New York, and said Receiver and Sequestrator having duly qualified and is still acting as such; and as such he is now in possession of assets, property and income belonging to the defendant herein; and on or about April 30, 1954, the defendant herein having served a notice of special appearance herein by his attorney, Sol A. Rosenblatt, Esq., for the purpose of objecting to the jurisdiction of this Court of the person of the defendant, and of the subject of this action; and thereafter, and on or about July 1, 1954, the defendant having joined issue herein by the service of his answer to the complaint herein, in which answer the defendant stated that he was appearing specially herein by virtue of the order of the Court entered June 16, 1954 pursuant to Section 237-a C. P. A. subd. 3(c) and this cause having duly come on for trial before me at a Special Term, Part IX of this Court, on the 10th, 11th, 12th, 13th, 14, 24th and 25th days of January, 1955; and the plaintiff having appeared by Monroe J. Winsten, Esq., her attorney, and the defendant having appeared herein by Sol. A. Rosenblatt, Esq., his attorney, and the plaintiff having adduced her proofs and evidence in respect of the allegations of the complaint with respect to cruelty, abandonment and non-support, and the Court not having considered the same in respect of plaintiff's claims for a separation because such claim for separation was barred by the ex parte Nevada decree of divorce obtained by defendant against plaintiff, and the Court having considered said proofs and evidence in connection with plaintiff's claim and plaintiff's needs for her maintenance, pursuant to Section 1170-b of the Civil Practice Act, and the Court having rendered and filed its decisions in writing, deciding, among other things, that the plaintiff herein is not entitled to a separation by reason of its finding that a decree of divorce had been previously granted to the defendant

herein in an action in which jurisdiction over the person of the plaintiff herein was not obtained, and that such decree in the State of Nevada was entitled to full faith and credit and was a bar to plaintiff's action for a separation, and that notwithstanding such finding, justice requires that the plaintiff herein is entitled to be supported and maintained by the defendant herein pursuant to Section 1170-b of the C. P. A., and due deliberation having been had thereon, it is

ORDERED, ADJUDGED AND DECREED, that a separation is hereby denied to the plaintiff, Patricia W. Vanderbilt, and that by reason of the bar of the Nevada decree in favor of the defendant, plaintiff's complaint for separation is dismissed on the merits, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant, Cornelius Vanderbilt, Jr., be and he hereby is directed to pay to the plaintiff, Patricia W. Vanderbilt, as and for her maintenance, the sum of Two Hundred and Fifty ($250.00) Dollars, each week from and after the 8th day of June, 1954, and weekly thereafter, said payments to be made to the plaintiff herein at the office of her attorney, Monroe J. Winsten, Esq., 320 Broadway, New York 7, N. Y., or to such other address as the plaintiff hereafter may designate in writing by notice mailed to the defendant at his last known place of residence and to the Receiver and Sequestrator herein, and it is further

ORDERED, ADJUDGED AND RECEIVED, that Thomas McCoy, Esq., as Receiver and Sequestrator herein, be and he hereby is authorized and directed to pay to the plaintiff herein the aforementioned sum of $250.00 per week in accordance with the provisions of this judgment, by payment to the plaintiff herein of a sum equal to the sum of $250.00 multiplied by the number of weeks which shall have elapsed from June 8th, 1954, to the date of the payment of the aforementioned

sum by said Receiver and Sequestrator to the plaintiff, and said Receiver and Sequestrator is hereby authorized and directed to pay to the plaintiff the additional sums of $250.00 one week after the date of the aforementioned payment, and the sum of $250.00 weekly thereafter in each and every week, out of the moneys, funds, property and other assets which he, as such Sequestrator and Receiver, has received or may become entitled to receive as such Receiver and Sequestrator herein, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant, Cornelius Vanderbilt, Jr., be and he hereby is directed to pay the sum of $3,500.00 hereby awarded to the plaintiff as and for an additional allowance for counsel fees for services rendered by her counsel, to and including the date of the entry of this judgment, the said sum of $3,500.00 shall be paid at the office of Monroe J. Winsten, Esq., 320 Broadway, New York, N. Y., and it is further

ORDERED, ADJUDGED AND DECREED, that Thomas McCoy, Esq., as Receiver and Sequestrator herein, be and he hereby is authorized and directed to pay the aforementioned sum of $3,500.00 in accordance with the provisions of this judgment to plaintiff at the office of Monroe J. Winsten, Esq., as attorney for the plaintiff herein, out of the moneys, funds, property and assets which he, as such Receiver and Sequestrator, has received or may become entitled to receive herein as such Receiver and Sequestrator herein, and it is further

ORDERED, ADJUDGED AND DECREED, that the plaintiff, Patricia W. Vanderbilt, do recover from the defendant, Cornelius Vanderbilt, Jr., the sum of $375.30 costs to be taxed and inserted by the Clerk of this Court, and the said Thomas McCoy, Esq., as Receiver and Sequestrator herein, be and he hereby is authorized and directed to pay the

amount of such costs to Monroe J. Winsten, Esq., as attorney for the plaintiff herein, out of the moneys, funds, property and assets, which he, as such Receiver and Sequestrator, has received, or may become entitled to receive herein as such Receiver and Sequestrator.

ENTER

S. S. Di F
J.S.C.

ARCHIBALD R. WATSON
Clerk of the County of New York

Filed

Mar 31, 1955
New York
Co. Clerk's Office

Plaintiff's Address: 138 East 38th St., New York, N. Y.

Defendant's Address: First National Bank Bldg., Reno, Nevada.

Nevada Decree of Divorce dated June 30, 1953

No. 146,128 Dept. No. 1

In the

SECOND JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

In and for the County of Washoe

JOHN S. SINAI
Attorney for Plaintiff

FILED
Jun 30 9 39 AM '53
H. K. BROWN, Clerk
By S. HANNUN
Deputy

CORNELIUS VANDERBILT, JR.,

Plaintiff,

vs.

PATRICIA W. VANDERBILT,

Defendant.

DECREE OF DIVORCE

The above-entitled action came on regularly for trial this 30th day of June, 1953, before the above-entitled Court without a jury, JOHN S. SINAI appearing as attorney for the plaintiff, and the default of the defendant having been duly entered, made, and taken, and it appearing that the defendant has been legally and duly served with process

and has failed to appear and answer within the time prescribed by law; and it appearing to the Court that the plaintiff is now and has been for more than six weeks last past, immediately preceding the filing of the Complaint, a resident of and domiciled in the City of Reno, County of Washoe, State of Nevada, and the Court having listened to the testimony introduced at said hearing, from which it appears and the Court finding that all of the allegations of the complaint are sustained by the testimony, free from all legal exceptions as to the competency, admissibility and sufficiency, and the same having been submitted to the Court for its decision, and the Court having filed its Findings of Fact and Conclusions of Law, determining that the above-named plaintiff is entitled to a decree of divorce from the defendant upon the ground of Extreme Cruelty, NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the bonds of matrimony heretofore and now existing between the above-named plaintiff and defendant be, and the same hereby are, dissolved and declared forever at an end, said divorce to be in full force and effect immediately, there being no provision in the laws of the State of Nevada for interlocutory divorce or restrictions on remarriage of either party; that the marriage heretofore and now existing between the parties hereby is dissolved absolutely and forever, and they hereby are freed and released from the bonds of matrimony and all the duties and obligations thereof; and each of the parties hereby is restored to the status of unmarried persons.

DONE in Open Court this 30th day of June, 1953.

/s/ JOHN S. BELFORD
District Judge

Extract From Final Order of Supreme Court, New York County, dated February 27, 1953, Dismissing First Separation Action

"ORDERED, that the said Referee's Report (1) that the plaintiff and the defendant were not residents of this State when the action was commenced, and (2) that neither the plaintiff nor the defendant was a resident of this State when the action was commenced, nor had he or she been a resident thereof for at least one year continuously at any time prior to the commencement of the action on October 1, 1952, be and the same hereby is, in all respects, confirmed; and it is further

ORDERED, that the defendant's consolidated motions to set aside the service of the summons and to dismiss the complaint and for judgment dismissing the complaint and each course of action therein alleged, be and the same hereby are, in all respects, granted;"

Office - Supreme Court, U.S.
FILED
MAR 19 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1956

No. 302

CORNELIUS VANDERBILT, JR.,
Petitioner,

v.

PATRICIA W. VANDERBILT,

and

THOMAS F. McCOY, Receiver and Sequestrator,
Respondents.

PETITIONER'S BRIEF ON CERTIORARI

SOL A. ROSENBLATT,
CHARLES RODEN,
630 Fifth Avenue,
New York 20, New York,
Counsel for Petitioner.

SOL A. ROSENBLATT,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1956

No. 302

CORNELIUS VANDERBILT, JR.,
Petitioner,

v.

PATRICIA W. VANDERBILT,

and

THOMAS F. McCOY, Receiver and Sequestrator,
Respondents.

PETITIONER'S BRIEF ON CERTIORARI

Opinions Below

Court of Appeals of the State of New York, 1 N. Y. 2d, 342; (R. 540) Appellate Division of the Supreme Court of the State of New York, First Judicial Department, 1 App. Div. 2d, 3; 147 N. Y. S. 2d, 125; (R. 527) Supreme Court of the State of New York, County of New York (after trial), 207 Misc. 291; id. 294; 138 N. Y. S. 2d, 222; (R. 503-505) Supreme Court of the State of New York, County of New York (upon preliminary motion to dismiss), 133 N. Y. S. 2d, 314 (not officially reported).

Jurisdiction

The judgment of the Court of Appeals was entered on May 31, 1956. Upon remittitur filed, judgment was entered

thereon in the Supreme Court, New York County, and the office of the Clerk of the County of New York, on June 8, 1956. Defendant's petition for certiorari was filed in this Court on August 8, 1956. Certiorari was granted by this Court on October 8, 1956.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

Questions for Review

1. Was full faith and credit denied petitioner's ex parte Nevada divorce decree, by the enactment of New York Civil Practice Act, Section 1170-b, and by its application below in a State which never had jurisdiction of the marital res, as follows:

(a) Permitting respondent, Mrs. Vanderbilt, as plaintiff, after having been divorced, to commence a separation action as a married woman against petitioner, as a non-resident defendant, and to sequestrate his New York property in connection therewith?

(b) Permitting divorced plaintiff to complete a jurisdictional domicile of one year as a married woman, in order to maintain the separation action?

(c) Adjudicating that defendant was guilty of marital misconduct, as the foundation for the maintenance award "as justice may require", after the dismissal of the separation claim upon the grounds that it was barred by the valid Nevada decree? and

(d) Awarding maintenance after the divorce?

2. Does that statute (Sec. 1170-b) and its application below deny full faith and credit to the Nevada decree and deny petitioner the equal protection of the laws in imposing upon him as a non-resident, a post-marital obligation which did not exist in contemplation either at the time of the foreign marriage or the physical separation of the parties?

3. Is that statute and its application below discriminatory in that: it intentionally was designed to meet the evil where a husband procures an ex parte decree of divorce outside of the State of New York; and it may not be applied against a similar New York divorce decree; and it may not be applied in any other New York separation action (not involving severance of marriage) if the separation is denied?

4. Was petitioner denied due process of law under the following circumstances:

(a) Where the publication of process and the papers causing sequestration of defendant's property were classic in form in an action by a married woman for a separation and made no mention of the Nevada divorce decree nor that plaintiff would seek maintenance as a divorced woman?

(b) By the finding of marital misconduct on defendant's part after the dismissal of plaintiff's claim for a separation upon the merits and the denial to him of an opportunity to contest that issue? and

(c) That the basis for award of maintenance after divorce rests solely upon the vague and indefinite phrase "as justice may require" and plaintiff is required falsely to claim in connection therewith that she is a married woman in order to justify the award?

Constitutional and Statutory Provisions Involved

Article I, Section 10, reads, in part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . ."

Article IV, Section 1, reads, in part:

> "Full faith and credit shall be given in each State to the public acts, Records, and Judicial Proceedings of every other State."

Article IV, Section 2, reads, in part:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, Section 1, reads, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Civil Practice Act:

> "Sec. 1170-b. Maintenance of wife where divorce or annulment previously granted on nonpersonal jurisdiction.
>
> In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this action shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter."
>
> Added by L. 1953 ch. 663, effective April 13.

New York Civil Practice Act Sections 232(1), 232-a(5), 1161, 1164, 1165-a, 1166, 1171-a (Appendix: pp. 1a-3a.

Statement

This ex parte separation action was commenced by publication of the summons by respondent as plaintiff and alleged wife and then resident in New York, against the petitioner as defendant and alleged husband and then resident in Nevada. (R. 9) Defendant appeared specially, and objected to the jurisdiction of the Court over his person and of the subject matter. (R. 17) After his preliminary motion to dismiss the action was denied, he preserved his special appearance with the permission of the court, and he answered to the complaint and set up as a bar to the action, his jurisdictional objections and the ex parte decree of divorce previously procured by him against the plaintiff (R. 19-20).

The parties were married in Connecticut in September 1948. There is no issue of the marriage. (R. 12) Defendant then was domiciled in Nevada, and plaintiff then was domiciled in California. (Pl. ex. I; R. 33; Def. ex. F, Par. 17; R. 230) Each had been so domiciled for many years prior to the marriage. (R. 131, 160) By virtue of the marriage, Nevada became the initial marital domicile of the parties, and a few months thereafter they established California as their subsequent marital domicile, which continued until their physical separation in September 1952 (R. 90-95). When married, respondent was twenty-eight years of age, and petitioner, fifty. She had previously been divorced once, and he, four times. (R. 152, 128-129).

On October 1, 1952 the respondent, as plaintiff, commenced a prior separation action against petitioner, as defendant, in the Supreme Court, New York County, founded upon a complaint verified by her while she was in California, in which she falsely alleged the parties to be residents of New York (R. 38, 228). Plaintiff did not actually come to New York herself until December 1952, over two months after the commencement of that prior action. She only was in New York a short while before returning to her domicile in California (R. 95). The prior separation action was dismissed by final order of the

Supreme Court, New York County, dated February 27, 1953, which adjudged that *the parties were not residents of New York State as of October 1, 1952,* and that neither had ever resided in New York prior thereto continuously for one year (R. 506-7; Def. Ex. G; R. 230-1).

On February 12, 1953, the wife came to New York, and allegedly has resided there ever since (R. 96). Thereafter, in March 1953, the husband changed his domicile from California back to Nevada (R. 315-316). He then procured a final ex parte decree of divorce against the respondent in the State of Nevada on June 30, 1953 (R. 22). While said divorce action was pending, respondent made a motion in her first separation action (then pending on her appeal, subsequently dismissed) to enjoin petitioner from proceeding with his said divorce action, and said motion was denied by order of the Supreme Court below dated July 3, 1953 (R. 232; Def. Ex. H; R. 234).

Meanwhile, on April 13, 1953, there became effective New York Civil Practice Act, Sec. 1170-b. One year later, in April 1954, respondent resting her jurisdictional allegation on that one year residence (R. 12), commenced publication of the summons herein against defendant as a nonresident. Respondent had procured an ex parte order from the Supreme Court, New York County, on April 21, 1954, sequestrating petitioner's New York property. Neither said order, nor the papers upon which it was based, made any reference to the divorce (R. 5-17). These papers were served upon defendant in Nevada, (R. 10-11, 394-395).

At the close of plaintiff's case for a separation, the trial Court dismissed the same "upon the merits", (R. 3) with an opinion sustaining the validity of defendant's Nevada residence and to the effect that the separation was barred by the Nevada decree (R. 342). The trial Court then proceeded to take plaintiff's proofs as to the financial circumstances of the parties as a basis for an award of maintenance. It then rendered its second or final opinion which awarded the maintenance (R. 505). Defendant then appealed

to the Appellate Division of the Supreme Court from that part of the judgment which made the awards to plaintiff. Plaintiff cross-appealed upon the principal grounds that the awards were inadequate and that the Nevada divorce decree should not have been sustained. That Court affirmed both appeals and rendered an opinion sustaining the constitutionality of Sec. 1170-b. The Presiding Justice dissented in a separate opinion (R. 539). Both parties then further appealed to the Court of Appeals, which affirmed with an opinion also sustaining the constitutionality of Sec. 1170-b. Two Judges dissented in a separate opinion to the effect that that statute is unconstitutional (R. 548).

A stipulation was made and judicially approved below, dispensing with the printing of exhibits (R. 519). They will be filed with this Court.

Summary of Argument

C.P.A. Sec. 1170-b necessarily required denial of full faith and credit to the Nevada divorce decree because of its mandate that a divorced woman commence a separation action falsely claiming to be married, as a prerequisite to an award of maintenance.

There was a denial of any *prima facie* effect to the Nevada decree severing the marital tie, in the very maintenance of the separation action and the sequestration of defendant's property.

The subsequent finding in this action of misconduct on defendant's part as a basis for a maintenance award under the banner of "as justice may require", after the dismissal of the complaint for a separation "upon the merits", flouted the principle that the Nevada decree is conclusive on everything except jurisdiction.

Full faith and credit also was denied the Nevada decree, because, after having been divorced, plaintiff was permitted

to complete a one year's jurisdictional residence in New York, a statutory prerequisite to the commencement of the separation action as a married woman.

The general common law duty which a husband has to support his wife, and her implied agency to pledge his credit for necessaries when he fails to do so, does not survive severance of the marital tie. The duty of support is not a property right. It is only when it is reduced first to an alimony award and made specific and vested that it survives an ex parte divorce decree.

Sec. 1170-b is discriminatory in that it was intentionally designed by the New York Legislature only to apply to out-of-State ex parte divorce decrees. A similar New York divorce decree would be conclusive until set aside, and no woman would be permitted to commence a separation action in the face of it, claiming that she still is married; nor could she be awarded alimony in any other separation action, not involving severance of the marital tie, if the main relief of separation be denied.

The combination of the publication of the summons in this ex parte separation action, coupled with the sequestration of defendant's property upon the grounds that he was a nonresident, producing the award under Sec. 1170-b, were in themselves a snare for the nonresident since that combination of proceedings could not be directed against a New York husband who had procured a similar ex parte divorce decree.

The seizure of defendant's New York property together with the publication of the summons entitled "Action for Separation", were made without due and proper notice to the nonresident defendant that a divorced woman would seek maintenance as such, under Sec. 1170-b. The judgment rendered did not conform to the process.

The refusal of the trial Court to instruct defendant as to how he was to proceed to oppose an award "as justice may require" and its finding of marital misconduct on his

part, although dismissing the complaint denying the separation which was sought upon the grounds of that alleged misconduct, denied him a fair trial.

The statutory requirement that the woman must have been the subject of *ex parte* divorce and nevertheless falsely claim that she still is a married woman and seeks a separation, in order to procure maintenance, "as justice may require", is indefinite and obnoxious to due process.

POINT I

Full faith and credit was denied the Nevada decree.

A. Very Little Faith and Credit—Plaintiff's Maintenance of the Action as if Still Married.

The basic evil of Section 1170-b is that it contains an immoral and inexorable command to deny full faith and credit to an out-of-State *ex parte* divorce decree. If a woman has been validly divorced elsewhere, she is instructed by that statute to commence a separation action, falsely claiming that she still is a married woman, so that only if the action is dismissed because of the already known to exist divorce, she then may receive an award of maintenance.

The extremity to which the statutory means was carried is rather startling. It pervades this entire case. Unless set aside by this Court, it sets a flagrant style for other divorcees, and a chaotic precedent for abridgment of right.

As the proofs and findings made disclose, there was no real dispute below concerning the validity of defendant's Nevada domicile. The trial court found Plaintiff's contravening proof, "meager", (R. 343). The Appellate Division found it to have "little substance", (R. 538). By operation of law, upon the marriage Nevada became his wife's domicile as well[1]. After a subsequent brief married life with plaintiff

[1] *Matter of Daggett*, 255 N. Y. 243, 246; *Gray* v. *Gray*, 143 N. Y. 354, 359.

as domiciliaries of California, defendant merely resumed his former domicile.

Plaintiff had made no mention whatsoever of the existence of the Nevada divorce decree in her complaint or in her papers seeking publication of the summons and sequestration of defendant's property in New York (R. 5-17). Nor did plaintiff in fact signal any actual attack herein upon defendant's Nevada decree, until prompted by the Trial Court to do so at the close of her *prima facie* case, which was permitted to be reopened for that purpose (R. 268-271).

This abuse flowered with the surprising remark by the trial Justice to the effect that it was of no moment that plaintiff had failed by those preliminary omissions to impart to the Court knowledge of the existence of the divorce decree (R. 393-394).

Thus, defendant was deprived of the *prima facie* effect of the Nevada decree and plaintiff permitted sequestration and publication as though a married woman. It is by these ex parte methods that plaintiff was so richly rewarded below, and defendant calumniated by additional appellate judicial finding below that he was a cruel husband (R. 537-538, 547). This was done to place the award under the banner "as justice may require" and was made in the face of the previous opposite finding of misconduct on the wife's part by the Nevada Court. It contradicted the trial Court's dismissal of the separation claim "upon the merits" (R. 344, 3). The finding below of misconduct on petitioner's part was contrary to the ruling in *Williams v. North Carolina*, 325 U. S. 226, 229, to the effect that the divorce judgment is conclusive on the merits as to everything but jurisdiction. If this were not the rule there would be no finality to the severance of the marital relation. Both spouses, in such case, could procure successive ex parte divorce decrees against each other in different states.

This Court is here presented with the implicit statutory pronouncement applied below, that the Nevada decree need

not be given full credit; and that this plaintiff and all other women similarly situated, may be treated as married women for the purposes of maintaining the action, although admittedly divorced.

It will be noted that Civil Practice Act, Sections 1165-a(3) and 1166, which were enacted long before Section 1170-b had any incipiency, relate to the right of a married woman (and not a divorced woman) to establish a residence for the purposes of commencing a separation action. Civil Practice Act, Sec. 1161, specifies the grounds upon which a separation action may be brought ". . . by a husband or wife against the other party to the marriage . . .".

We believe it to be an irrefutable proposition that, as applied below, the Nevada decree was given no faith and no credit. In order that the action might be maintained by a so-called married woman, the courts below blinded themselves to the existence of the Nevada decree dissolving the marriage.

Even if the marriage obligation be philosophically fractured into two ties, the one marital, and the other economic, faith and credit must at least be given to the cancellation of the marital tie. That faith and credit may not be suspended by a State Legislature which seeks a devious means of reviving the dead marriage for the purposes of securing benefits to the wife through raising the ghost of a departed relationship.

The permissive maintenance of the separation action in itself was a denial of full faith and credit. Upon it rested the claim to further relief by way of financial award. Without the assertion of the present existence of the marriage there could have been no separation action herein and as a result there could have been no compliance with Sec. 1170-b.

It well has been said that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure, and

that this requires ever watchful supervision by the Courts against statutory encroachments upon the rights of the citizen. *Boyd* v. *United States*, 116 U. S. 616, 635; 29 L. ed. 746, 752.

B. Part-Time Faith and Credit—Plaintiff's Completion of New York's Domiciliary Requirements as if Still Married.

There is another bewildering aspect of this action, equally if not more obnoxious to a proper concept of full faith and credit. Although Mrs. Vanderbilt was validly divorced on June 30, 1953, after having only commenced her New York residence a few months before then on February 12th of that year, yet she was permitted thereafter to fill out the New York jurisdictional prerequisite of a one-year continuous domicile as a condition for the maintenance of a separation action by a married woman.[2] (R. 220-222)

What has happened herein appears to us to defy plain logic and common understanding. The New York statute says that a married woman must dwell within New York continuously for one year as a condition for the commencement of a separation action. How can it permit a woman to complete that one year and to maintain a separation action as a married woman, if she already has been validly divorced many months before? Her status as a wife has been dissolved.

A validly divorced woman is not a wronged wife who may export the marital res into another state and unilaterally effect a new matrimonial domicile.

The majority below said that it need not decide whether Mrs. Vanderbilt would have the same right to sue for a separation and establish a one-year residence under Civil Practice Act, Sec. 1165-a, after divorce (R. 546). But is that not a crucial test herein? If the former wife could not establish residence as a married woman after divorce, how

[2]Civil Practice Act, Sec. 1165-a(3).

may she be permitted to establish a goodly portion of that one year residence after divorce?

This is not a very honest piece of legislation, which makes the State a winking party to a pretense with a woman that she is still married, knowing well that it proposes to dismiss her action because she is not. The farce of the situation is that the Court below, in following the statute, sustained the dismissal of the separation action at the close of plaintiff's case, holding that full faith and credit required that this be done in consequence of the Nevada decree. But the Courts below refused to dismiss the separation action as of the outset, (133 N. Y. S. 2d, 314), even though plaintiff then was unmarried, and had not challenged the Nevada divorce, and could not as a married woman complete the jurisdiction prerequisite for the maintenance of the action.

The Courts below erroneously refused to give full faith and credit as of June 30, 1953, when the decree was rendered, and only gave it part time faith and credit as of the close of plaintiff's case. The rule restated in *Davis* v. *Davis*, 305 U. S. 32, 40, that full faith and credit must be given to a judgment at all times since its rendition and not some of the time, was completely ignored.

We are loath to see legislation of clever tricks into the judicial process. Those who betray the truth cannot flee down the labyrinthine ways of the law without betraying themselves. There can be no virtue in such a statute.

C. No Faith and Credit—The Legislative Gift of Support After Divorce.

The economic aspect of the marriage, founded upon a general duty of support, we contend, ceased with the divorce, and unjustifiably was whittled off the Nevada decree.

The Nevada decree (R. 23) is quite clear; not only was the marriage dissolved, but the parties were "... freed and released from the bonds of matrimony and all the duties

and obligations thereof; . . ." and restored to the status of unmarried persons. In *Lynn* v. *Lynn*, 302 N. Y. 193, at p. 203 (cert. den. 342 U. S. 849), New York confirmed that it was the Nevada and New York law that such a decree cut off the right to support even if the Court did not expressly pass on that question in making the decree.

The laws of Nevada, California and Connecticut, the only States having anything to do with the marriage, are very clear, to the effect that the duty to support does not survive such a decree.[3] Except for the procedural indirection of Sec. 1170-b, to be applied only where prior ex parte judgments of marital severance have been procured, the law of New York has not changed its agreement with the latter rule.

We do not question that this Court, in its decision in *Estin* v. *Estin*, 334 U. S. 541, 92 L. ed. 1561, has settled the proposition that where a court of competent jurisdiction having both of the parties to the marriage before it, makes a financial award to the wife, that award is a fixed obligation which cannot be extinguished by a subsequent ex parte divorce decree rendered in favor of the husband in any other State.

Sound principles of res adjudicata always have required that where jurisdiction is had over all parties to an action, the judgment must be deemed forever conclusive as to the matters embraced within its terms. The *Estin* question probably would not have come before this Court were it not for the general understanding that with the dissolution of the marriage fall its obligations. In the *Estin* case, we believe the rule was clarified actually within the limits of res adjudicata, although more was said. The rendering of a support judgment vested the wife with a property interest which could not be swept away by subsequent decree not founded upon personal jurisdiction over her.

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[3] *Sweeney* v. *Sweeney*, 42 Nev. 431, 438-439; *Cardinale* v. *Cardinale*, 8 Cal. 2d. 762, 68 P. 2d. 351; *Calhoun* v. *Calhoun*, 70 C. A. 2d. 233, 160 P. 2d. 923; *Allen* v. *Allen*, 43 Conn. 419.

What we have in this case is quite another thing. The general common-law duty of a husband to support his wife, extinguished according to the laws of Nevada, was revived in New York for the purpose of posthumous liquidation and specification in a State which never had anything to do with the marriage.

In *Armstrong* v. *Armstrong*, 350 U. S. 568, 100 L. ed. 705 certain members of this Court treat of the general duty of the husband to support his wife as some kind of a fixed interest which cannot be extinguished in her absence. (The majority below erroneously deemed this to be the majority ruling of this Court in the *Armstrong* case. R. 545). It seems somewhat inconsistent to effectuate, on the other hand, that an ex parte divorce decree putting aside the wife is of lesser consequence than an inchoate duty to support.

Our argument under this subheading primarily revolves about the legal nature of the support duty. We are not here concerned with clinical analysis of the social aspect of the problem.

A new freedom has been given wives to roam the States and sue where they will.[4] Mrs. Vanderbilt did not choose to take advantage of the Nevada statutes, which provided the financial means for her coming there to litigate the issues.[5] Sparked by the pending legislation of 1170-b, she preferred to travel at her own expense from California to New York. She then let the divorce go by default. Then waiting out New York's one year residence requirement, she commenced this second separation action and seized petitioner's property to enforce her migrant desires herein.

This Court in other cases has moved to protect the wife who stays at home. It should now equally be moved in favor of the one-time husband. We believe that a brake must be applied against this new feminine evolvement of interstate commerce in alimony.

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[4]The majority below erroneously concluded that the husband herein was the first to abandon California (R. 546).

[5]*Ormsby* v. *District Court*, 51 Nev. 339, 276 P. 14.

Despite asseverations below to the contrary, we find nothing determined by this Court subsequent to *Thompson* v. *Thompson;* 226 U. S. 551, 566-567, 57 L. ed. 347, 353, which renders less effective its adjudication in that case that an ex parte divorce decree rendered in favor of the husband at the place of matrimonial domicile, forecloses commencement of a subsequent maintenance action by the wife in another jurisdiction.

In *Estin* v. *Estin*, 334 U. S. 541, pp. 546-547, this Court apparently still considered the *Thompson* case good law. It made the very nice distinction, with which we are heartily in accord, namely, that in the *Thompson* case the wife was held to have forfeited her right to alimony under the laws of the martrimonial domicile, as distinguished from the *Estin* case, which involved a marriage where both the parties were domiciled in New York and New York was rightfully concerned that the wife be not left impoverished.

With all due respect, we do not think it is appropriate for this Court, by judicial fiat, to legislate a general proposition of survival of support which is contrary to the laws of the State having jurisdiction of the marriage. A change in the substantive support obligation of the marriage so as to make it survive the divorce in a proper case is one for Legislative enactment by the several States. It is not inherent in the common law. It is quite within the province of a State to legislate away alimony entirely.

The vice of this kind of judicial legislation is that the New York Legislature evidently presumed that this Court had laid down a rule of substantive law, which might universally be followed as such, to the effect that a husband's general duty to support the wife was a property right which necessarily survives any prior ex parte divorce decree rendered against her

A reading of the report of the New York Law Revision Commission, being Legislative Document (1953) No. 65K, shows this to be just the case. There was no recommendation that a change be made in the New York substantive law

with respect to continuing the general duty of a man towards his wife, after divorce, nor was any such legislation enacted. That document merely suggests a remedy to implement what it believed to be the effect of certain rulings of this Court. The majority opinion below appears to bear out this view (R. 544-546).

If an examination is made of Note 40, appearing at page 14 of that Legislative document, it also will be observed that the *Thompson* case erroneously was cited to the Legislature as a case in which there was a support order existing *prior* to the rendition of the divorce decree. Apparently the facts and legal force of the *Thompson* case were not even correctly considered by the Legislature in enacting Sec. 1170-b.

What the courts below have done is to accept the unrelated broad commentaries of this Court as a substitute for Legislative mandate. Our contention in this respect is reinforced, we believe, by the decision in *Fein* v. *Fein*, 261 N. Y. 441, where the Court below, under a comparable statute (Civil Practice Act, Sec. 1164) held that support could not be awarded the wife, if she be denied a separation.

Under Sec. 1170-b there is no change in the basic common law which confines to the duration of the marriage the husband's general duty to pay for his wife's necessaries and which long ago was translated into the statutory remedy of alimony. By Sec. 1170-b the New York Legislature now has created a posthumous remedy without any corresponding substantive duty. The remedy is made applicable only if there be a prior judgment in effect decreeing the termination of the marriage. It is the same as if the remedy of divorce were created to apply where no marriage existed.

That dilemma of Sec. 1170-b is underscored by its provision to the effect that after the separation has been denied because of the existence of a valid divorce decree, then the Court may award maintenance to the "wife" (whom it already has adjudicated is not the wife), "as justice may require".

We shall discuss under our due process point, that the phrase "as justice may require" is rather a vague premise upon which to base relief to a new end of post-marital support, having no foundation in the common law or the previously established public policy of the community. As was stated in *Ramsden* v. *Ramsden*, 91 N. Y. 281, there is no inherent power in the courts to award support to a wife apart from statute. No independent action for maintenance exists in New York, *Johnson* v. *Johnson*, 206 N. Y. 561. Thus, giving 1170-b the utmost liberal construction, it wholly fails of its purpose.

We return to the question, therefore, of what, then, is the nature of a husband's general duty of support which enabled the Court below to partition his divorce decree?

In *Romaine* v. *Chauncey*, 129 N. Y. 566, 570-571, the principle which obtains in New York was stated as follows: "During the marriage the husband owes to the wife the duty of support and maintenance although owing her no debt in the legal sense of the word; . . ." And the Court continued, when a judgment of divorce and alimony has been rendered against a husband, the allowance becomes a debt in the sense that the general duty has been measured and made specific by the Court, since ". . . the wife's right to alimony comes from the statute and not from the common law."

The general principles above stated in *Romaine* v. *Chauncey*, supra, were the subject of review by this Court and that case cited with approval in *Audubon* v. *Shufeldt*, 181 U. S. 575, 45 L. ed. 1009.

Again those principles were cited with approval in *Wetmore* v. *Markoe*, 196 U. S. 68, 73, 74; 49 L. ed. 390, 392, 393, where an award of alimony was defined by this Court as ". . . a penalty imposed for failure to perform a duty."

The rights of the wife at common law, as restated in *Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456, 464-465, were, that

in the absence of a statute providing the means of alimony, the most that the wife could do was to go out into the market place and obtain necessaries upon her husband's credit. This latter expediency undoubtedly evolved out of the consideration that the wife should not be thrust upon the community as a public charge. 1 Schouler, Marriage, Divorce, Separation and Domestic Relations, (6th Ed. Blakemore, 1921) Sec. 83.

In dissecting the essence of this inchoate duty of support, comparison may be made with a wife's inchoate right of dower as generally understood at common law. There is a strong relationship between the two. It has been said that an alimony award may be made in lieu of dower. 2 Schouler, Marriage, Divorce, Separation and Domestic Relations, (6th Ed. Blakemore, 1921) Sec. 1825.

In *Randall* v. *Krieger*, 23 Wall. 137, 90 U. S. 137, 23 L. ed. 124, this Court, in reviewing the nature and incidents of the marriage relationship, states, in respect of dower, the following:

> "During the life of the husband, the right is a mere expectancy or possibility. In that condition of things the law-making power may deal with it as may be proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish or otherwise alter it or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor."

We say that similarly, the general duty of a husband to support his wife is a mere expectancy, it has not become vested or choate, and cannot be transformed into an alimony debt by any decree of a court made after the death of a marriage.

In *Ferry* v. *Spokane P. & S. R. Co.*, 258 U. S. 314, 66 L. ed. 635, at p. 318 (L. ed. p. 638), this Court stated the following:

> "Dower is not a privilege or immunity of citizenship, either state or Federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation; . . ."

Equally important, perhaps, in the *Ferry* case, is the holding by this Court that the State of Oregon had the complete right and power to terminate the wife's right of dower solely on the basis of her non-residence in the State. It necessarily follows, therefore, that the States of California and Nevada, which sanctioned the marital relationship and the obligations thereof and gave them life, had the same right to decree that they may be terminated upon the husband's ex parte divorce.

In his dissenting opinion in the Court of Appeals below, Judge Fuld finds Sec. 1170-b offensive to full faith and credit (R. 548). He distills with utmost clarity some of the basic points we make herein. He points out that a claim for support furnishes no foundation in itself for an independent cause of action in New York and that under the Nevada law, as in New York, the duty to support fell with the marriage dissolution. With sound logic, Judge Fuld points out that support, which in New York is a mere incident of the marital relationship and does not furnish the basis of a separate cause of action, ought not to be kept alive in New York with the deceptive appeal of the phrase "divisible divorce", by an adjudication in respect of a marital status which never existed in New York and which had been extinguished in another State having such jurisdiction.

Judge Fuld went on to point out that Mrs. Vanderbilt was not even domiciled in New York for one year prior to

her divorce and was thus ineligible to maintain a separation action as a married woman; and that to award support under Sec. 1170-b to a woman under those circumstances under the banner of "as justice may require" could not be done since there was no supporting New York public policy; and further, that only by confining the application of the statute to a wife who had standing to institute the matrimonial action at the time the foreign divorce was granted should New York arouse its interest and thus avoid unseemly conflicts between New York State and other jurisdictions.

Presiding Justice Peck, of the Appellate Division of the Supreme Court, in his dissenting opinion below (R. 539), also points out that the State of the wife's new domicile may not, subsequent to a valid divorce previously obtained by the husband in another State, create new alimony rights upon some theory of retaining a continuing surviving interest in the former wife's status.

Indeed, when New York enacted a statute requiring a husband to support his step-children, its courts held that such a statute would be arbitrary and unreasonable if construed to apply to a marriage contracted prior to its enactment and the husband thereby made liable for something which was not a prospective burden of the marriage. (*Matter of Kane* v. *Necci*, 245 App. Div. 1, app. dis. 269 N. Y. 13). With equal force and justice we believe it may be said that it is arbitrary and unreasonable to thrust the burden of post-marital support upon petitioner by the posthumous enactment of Sec. 1170-b.

POINT II

Section 1170-b is discriminatory, and petitioner was denied equal protection of the laws.

A. Foreign Divorces Are the Intended Target of Sec. 1170-b.

It is readily apparent that the intended legislative target was the foreign and not the domestic divorce. Sec. 1170-b only applies to marital judgments where no personal jurisdiction is obtained over the wife. Safely protected is the customary New York judgment of divorce procured through ready jurisdiction over both parties as domiciliaries. That section was not legislated to cure an evil arising out of ex parte New York divorces; no such evil was proclaimed to exist. Nor does it exist.

The irony of this entire point on discrimination is that the admitted single purpose of enacting Sec. 1170-b was to combat the effect of foreign ex parte divorce decrees upon New York wives. The whole of the New York Legislative Document (1953) No. 65 (K), is devoted to a discussion of the development of the law in this respect. The entire legislative inspiration for Sec. 1170-b was the dramatization of the plight of *New York wives* whose husbands depart to other jurisdictions and procure ex parte divorces before their wives secure a New York alimony award. (The other irony, of course, is that this plaintiff should have been considered a New York wife by the mere fact of her migration and even before she had completed the one-year domicile necessary for the maintenance of the action as a married woman).

Prefacing that Legislative Document is the express statement (p. 6) to the effect that the proposed legislation is necessary ". . . to protect a New York wife . . .", whose right to support may be cut off ". . . by an ex parte foreign divorce decree . . .".

We thus have presented, the mischief felt and the remedy in view, as evidence of legislative intent.

The stumbling block was, as revealed in that Legislative Document, that in *Estin* v. *Estin*, supra (334 U. S. 541, 552; 554; 92 L. ed. 1561, 1570, 1571), both Mr. Justice FRANKFURTER and Mr. Justice JACKSON expressed concern as to whether New York was giving less effect to the Nevada decree than it would give to its own judgments similarly situated. Therefore, in order to make the glove seem to fit the hand, Sec. 1170-b was made to appear to be silent in respect of its direction to out-of-State decrees. That silence is meaningless. That statute does not and cannot have any real effect upon a New York judgment of similar nature.

It would be sheer folly for any attorney in New York, in the face of a valid New York ex parte judgment dissolving the marriage, to place on file a perjurious complaint by which he claims that the woman is still married and seeks a separation from bed and board.

It also is a vital point of discrimination that under the comparable wording of Civil Practice Act, Sec. 1164, if a New York woman, who is not divorced, loses her separation action, she may not be awarded alimony. *Fein* v. *Fein*, supra (260 N. Y. 441). Anomalous, therefore, is the award under Sec. 1170-b when she has been divorced.

This case is rife with prejudice against the non-resident man. When Mrs. Vanderbilt chose to come to New York it became impossible for Mr. Vanderbilt, upon his return to the original matrimonial domicile, to secure personal jurisdiction over her in Nevada. Mr. Vanderbilt's lack of ability to secure his wife's presence in the Nevada action has been made a defeating weakness by the Court below in its application to Sec. 1170-b. It would compel him to come to New York and defend his right upon a new field of combat chosen by the woman after the marital battle is over. It even failed to deem the plaintiff estopped by her futile

attempt in the first separation action to enjoin the Nevada proceedings.

Plaintiff was given sanctuary and immunity from everything prejudicial to her. New York deprived defendant of his right to equal protection of the laws.[6]

B. The Nevada Decree Was Made Less Conclusive Than A Similar New York Judgment.

Concededly, a reading of the form of Sec. 1170-b makes it appear quite innocent in respect of the point we make here. The substance is quite the contrary.

The formal language of Sec. 1170-b is to the effect that where the wife maintains a New York separation action wherein the separation is denied because of a judicial finding that a judgment of divorce has been previously granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, separate maintenance nevertheless then may be granted.

In effect, we are told below that according to Sec. 1170-b, if a New York husband obtains a valid ex parte judgment of divorce in New York against his wife, the conclusiveness of that adjudication may be disregarded by the Court which rendered it, that it is of less force than any other judgment, and is amenable to a subsequent separation action by the wife in New York. That ruling is an erroneous invasion of the common law and is contrary to statute. It has never been applied to any other judgment. There is rigid application in New York to the effect of a judgment, which is defined in Civil Practice Act, Sec. 472, in part as follows: "A judgment is the determination of the rights of the parties in an action; . . . "

It is the well-settled law of New York, and indeed the prevailing rule in most American jurisdictions, that such a

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[6] *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 511; 83 L. ed. 1423, 1434.

prior New York judgment is conclusive upon the merits until set aside. The New York statutes to which we previously have referred herein require that there be an existing marriage upon which to found an action for a separation. There is nothing in Sec. 1170-b which would make subordinate the conclusiveness of such a prior New York judgment terminating the marriage. Sec. 1170-b points to an action for a separation and perhaps impliedly invites an attack upon the prior divorce, but it does not legislate away the conclusive effect of the New York divorce judgment.

As was stated in *Herpe* v. *Herpe*, 225 N. Y. 323, at p. 327, the courts cannot, by amendment, change a judgment or limit its legal effect to meet some equity subsequently arising. Errors, in substance, must be corrected either by vacating the judgment or by appeal.

In *Gysin* v. *Gysin*, 263 N. Y. 509, the Court held that after two years, a judgment of divorce rendered by default even, could not be vacated for any reason, except for fraud.

We believe it inevitable that the New York courts would dismiss at the outset as barred by res adjudicata an action commenced by a woman for a separation, subsequent to an ex parte New York divorce judgment rendered against her. She would first have to secure the vacating of the divorce judgment, or, in her own action, impeach the divorce judgment as having been fraudulently procured. She could not let it stand as an adjudication that she is no longer married and then proceed to disregard it by commencing a separation action.

With all due respect to the majority in the Court of Appeals, its opinion begs this question. It says Sec. 1170-b has changed the policy of denying alimony where no marriage exists and further that the severance of the marital ties by foreign judgment is given the same recognition as such a severance in New York. (R. 547) The Court below does not state that a similar prior New York judgment of divorce could be made subject to a subsequent New York

separation suit and a judgment entered therein awarding maintenance under 1170-b. As we have shown above, the latter plainly could not be accomplished.

It is also important to remember that there is no law in New York which permits a maintenance award to a woman if she fails to obtain a judicial separation or a divorce against her husband. Not even if it be felt that justice required it, could the woman be awarded support under those circumstances. On the other hand, if the husband obtains a valid foreign ex parte divorce against the wife, he is susceptible to 1170-b.

C. The Sequestration of Defendant's Property As a Basis for Jurisdiction To Make Awards Necessarily Was Discriminatory.

The petitioner's special appearance contesting the jurisdiction of the Court over his person has been sustained by all the courts below. (R. 505, 538, 541) This ex parte separation action, commenced by publication, wrongfully has been attached to defendant's New York assets because of the refusal by the courts below to give effect to the Nevada excision of his former wife's alleged economic interest in the marriage.

The sequestration of the petitioner's property was made under N. Y. Civil Practice Act, Sec. 1171-a, and the publication of the summons commencing the action, under Civil Practice Act, Secs. 232, 232-a(5). The provisions of law generally upon which the plaintiff founded her right to commence this separation action by publication and to seek the various awards made to her, had their basis solely in the fact that petitioner, as defendant therein, was a nonresident of New York and a citizen of Nevada. If it had been a New York husband who had procured a New York divorce judgment, the subsequent separation action could not have been so commenced by publication and his property thus sequestrated for the purposes of supporting prospective alimony

awards. It should have been necessary that the Court below have before it a marital *res* as a basis for the seizure.[7] But, the Court below found that there had been no actual *res* in New York founded upon the matrimonial domicile of both parties (R. 546). And then it found that no marital *res* existed.

How, then, can it be said, that what happened to Mr. Vanderbilt could happen to any New York husband or former husband who obtains a similar New York *ex parte* divorce? It is impossible, and simply could not be done. New York has imposed an affliction upon petitioner purely and solely because he is not a citizen of New York State. The price of the cure possibly was that he submit personally to New York's jurisdiction. This he could not and would not do.

It should be observed that the bulk of the sequestrated property consists of inalienable income from trusts established by his ancestors and of other property in the course of estate administration, and that it was not property voluntarily reposed by the defendant in New York (R. 6, Pl. Ex. 29; R. 356). The statute has been oppressively applied. We respectfully submit that this grave situation calls for emphatic correction by this Court before it spawns a national dilemma of state conflict.

POINT III

Petitioner was denied due process of law.

The denial of due process herein, in brief, falls into three principal categories: (A) Insufficient notice of objects and purposes of action; (B) deprivation of right to meet plaintiff's charges of misconduct and resulting judicial finding of misconduct on defendant's part; and (C) the vague and indefinite statute under which relief was granted.

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[7] *Geary v. Geary*, 272 N. Y. 390.

A. Lack of Proper Notice.

As we have indicated hereinbefore, neither in the summons, nor the papers upon which publication of the summons was effected and defendant's property sequestrated, nor in the complaint, was there any mention made of the existence of the prior Nevada decree. Nor was any warning given that a divorced woman would seek alimony under a revolutionary concept of law.

As this Court held in *Mullane v. Central Hanover B. & T. Co.*, 339 U. S. 306, 314; 94 L. Ed. 865, 873, the notice must be of such nature as reasonably to convey the required information.

The complaint, classic in form, merely called for a separation of married parties and the statutory award of alimony in connection therewith (R. 12). The summons itself bore the statutory warning,[5] "Action for Separation" (R. 11). Nevertheless, a different kind of judgment was entered in the action than called for by the complaint, which, in its body and its prayer for relief, requested support for a married woman upon obtaining a separation and did not request support for a divorced woman upon a denial of the separation.

When the Court sequestrated defendant's property and appointed a receiver, it did not know that he had divorced plaintiff (R. 5). If it had, it obviously could not have so acted without an attack upon the divorce decree. (Civil Practice Act, Sec. 1171-a).

Proper procedure should have required that plaintiff, in commencing a separation action as a married woman, plead an attack upon the prior Nevada decree. Sec. 1170-b did not require it and defendant did not know what was going on until he made his preliminary probing motion to dismiss the action for lack of jurisdiction of the subject

[5]Civil Practice Act, Sec. 1167.

matter and of his person. There was nothing in the process initiating the action which gave defendant warning that the divorce decree, the obtaining of which plaintiff unsuccessfully had sought to enjoin in her prior separation action, again would be the subject of attack under some revolutionary concept of law not defined in Sec. 1170-b and only evolved by judicial operation in this action at a costly price to petitioner.

The majority below brushed this contention aside on the theory that the statute itself was sufficient notice that an award of maintenance might be made (R. 548). Just how defendant a non-resident, was supposed to be apprised of this possible result by a newly enacted statute which is also silent in this respect, especially when no attack upon his divorce decree is pleaded, was not explained.

When Special Term below denied defendant's preliminary motion to dismiss, (*Vanderbilt* v. *Vanderbilt*, 133 N. Y. S. 2d 314, 316), it made the startling pronouncement in its opinion (p. 316) to the effect that the Nevada decree could be given no effect in New York until made a judgment there, and that plaintiff was not required to anticipate its assertion. The Court then proceeded (pp. 316-317) to discuss defendant's anticipatory fears expressed upon the motion, that plaintiff might assert rights under Sec. 1170-b, and the Court stated that plaintiff does not deny that she may rely upon it.

Genuine doubt existed. Defendant was required by the very nature of plaintiff's procedures to search out the objects and purposes of her action, and the entire burden was thrust upon him to define and anticipate the same. At least the Court permitted defendant to preserve his special appearance and objections to jurisdiction by answer, without waiver of the same (R. 19). The Court of Appeals sustained petitioner's right to defend the action upon the merits, without waiver of those objections to jurisdiction (R. 541).

There was no way in which defendant was apprised at the outset that plaintiff would seek relief as a divorced woman, and contrary to the holding below, the statute did not fill that gap. It is not reasonable to say that defendant should have dismissed from his mind the established legal effect of his Nevada decree as universally understood, and should have anticipated that once a summons bearing the notice "Action for Separation" is served upon him and his property sequestrated for such purposes, that anything but that might happen to him in the action.

As was held in *Hay* v. *Tuttle* 67 Minn. 56, 58-59, (69 N.W. 696) the purposes of attachment must be the claim upon which it was granted; and that, ". . . Courts should be very careful to prevent the enforced appearance of a nonresident on one purpose being used for some other and ulterior purpose."

If defendant had defaulted [illegible] pearance, only a judgment of separation and alimony [illegible] have been awarded against him. The issue was improp[illegible] ubstituted against a non-resident over his protests. *Coe* [illegible] *rmour Fertilizer Works*, 237 U. S. 413, 424; 59 L. ed. 10[illegible] 1032.

B. Denial of a Fair Trial.

One would think that in the absence of any previous experience and the failure of Sec. 1170-b to instruct upon procedure, the interests of substantial justice would have required that at least the trial Court chart a fair course of trial, as was requested by defendant's counsel, and that the Appellate Courts below would not have approved that omission.

Defendant's counsel literally did not know how to proceed, and he was not only refused guidance by court and statute, but actually deprived of a right of defense to meet plaintiff's testimony on defendant's alleged misconduct.

Of course, we are faced with a basic contradiction, in that the Nevada decree was supposed to have been conclu-

sive on everything except jurisdiction, and was supposed to have finally severed the marital tie because of the woman's misconduct. Nevertheless, in order to sustain an award under Sec. 1170-b upon the theory that justice required it, the Courts below proceeded to make a finding of misconduct on defendant's part in contravention of the Nevada decree (R. 537-538, 547).

In brief, the following is what happended upon the trial:

The trial Court denied defendant's counsel's opening motion for a separate and prior trial of the issue of the validity of defendant's Nevada domicile as raised by the defense contained in his answer (R. 26-30). The Court gave as its reason for such denial, that by the taking of testimony on defendant's alleged marital misconduct together with that concerning his Nevada domicile, the result is accomplished that if the defense be sustained, then testimony as to misconduct would be stricken out, and defendant ". . . has suffered nothing" (R. 39). The trial then proceeded with plaintiff's testimony as to defendant's alleged misconduct.

During the course of plaintiff's *prima facie* case, defendant's counsel asked the Court to define what justice required with respect to maintenance, and the Court declined to consider the question at the time (R. 222-223). When plaintiff rested her *prima facie* case, and defendant's motion to dismiss was made, the Court indicated that the trial would proceed on "the financial" and in the event the Court *did not* sustain the Nevada decree that then defendant could answer the charges of misconduct (R. 341-342).

The trial Court thereby expressly prescribed its procedure. It dismissed the complaint "upon the merits" (R. 344) and stated that it would take proofs of "income and earnings" and other pertinent "information" on the issue of maintenance (R. 345). The trial Court made it clear that in so far as the dismissal of the complaint was concerned, that dismissal related to the part of the action based on

defendant's alleged misconduct and that in so far as the balance of the relief was concerned, the trial was continuing only for the purpose of taking testimony as to income and resources and other incidental information necessary in connection with the claim of maintenance and support (R. 349).

Again, defendant's counsel objected that Sec. 1170-b provided no standard or measure whatsoever for the application of justice, and requested that the trial Justice should give the defendant a statement of what requirements were to be met in the application of the phrase "as justice may require" under Sec. 1170-b (R. 350). The Court refused to do so and said in effect that since the statute furnished no guidance the Court must use its discretion and must take testimony as to what plaintiff considers is necessary for her maintenance and overruled defendant's counsel's objection that he did not know now to proceed on the question (R. 351-352).

When the trial Court rendered its second decision awarding plaintiff maintenance under Sec. 1170-b, it reiterated, at the very outset of its opinion, that after the dismissal ". . . the proof of the parties was taken as to their finances, income, and plaintiff's needs, . . ." in the event the issue of maintenance under 1170-b was resolved in her favor (R. 506). Clearly, defendant by this series of rulings, was completely deprived of a full, fair and reasonable opportunity to meet and answer plaintiff's testimony as to his alleged misconduct and was denied the right to show that justice did not require an award of maintenance.

With the dismissal of plaintiff's complaint fell all the charges of misconduct. Nothing remained upon which the trial or appellate courts could rest a finding that defendant's misconduct justified awards to plaintiff.

The trial Court had consistently ruled, as above indicated, that only if the Nevada decree was set aside, would defendant's alleged misconduct be in issue, and that the

sustaining of the decree resulted in a continuance of the trial only for the purpose of taking further testimony on the financial aspects of plaintiff's claim: Just what was the defendant supposed to do under those circumstances? Even without such rulings of the Court, how could he proceed to offer testimony in justification of his own conduct and of freedom from mischief if plaintiff's complaint charging him with the offense already had been dismissed? That dismissal "upon the merits" terminated the phase of the action in which plaintiff asked for a separation based upon his alleged misconduct. That issue was resolved. There was nothing for him to meet in that respect.

Apparently, the sole test of why justice required that plaintiff be awarded maintenance, was that plaintiff is a woman and defendant is a man and he had divorced her. As we stated in our petition, equity has followed the woman and not the law.

The denial of a clear right and opportunity to the defendant to meet the plaintiff's charges of misconduct was an unequivocal denial to him of due process of law. Unjust were the awards to plaintiff under those circumstances and unjust was the additional finding of misconduct on defendant's part founded upon such a record."

C. "As Justice May Require" Was Not Defined.

This is a vague and indefinite basis upon which to found a new remedy revolutionizing the opposite principle previously entrenched in the public policy of New York and most other jurisdictions, that no duty of support survived the divorce. Its very vagueness renders the statute void.[9] There are serious penalties attached to failure of compli-

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[9] *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673; 74 L. ed. 1107; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168; 77 L. ed. 231, 239.

[10] *Connally* v. *General Construction Co.*, 269 U. S. 385; 70 L. ed. 322.

ance with support orders.[11] The basic statute from which the punishment springs should be very explicit.

If a woman be no longer married, she cannot pledge a former husband's credit for necessaries on the theory of an implied agency furnishing the legal basis therefor. This was the foundation for the alimony statutes. Sec. 1170-b has no substantive foundation. Its operation depends upon the intervening conjecture of the judicial mind as to what justice may require.

In any other separation case the wife must prove the husband's misconduct by a fair preponderance of the evidence. This apparently is not so where she has been divorced. Then she only need prove so much of the husband's misconduct as will satisfy the emotional requirements of justice.

The failure of the trial Court to meet the demands of defendant's counsel that the requirements of justice and the procedure thereunder be defined, and the actual denial to defendant of the right to r[illegible]st plaintiff's charges of misconduct, reiterates the defeat of due process in this action by a combination of judicial and statutory commission and omission.

Sec. 1170-b plainly encompasses hit-or-miss procedures.

Conclusion

New York Civil Practice Act, Section 1170-b, as applied in this case, should be held to violate the Federal Constitution and to be void.

The judgment entered in the New York County Clerk's office on March 31, 1955, as thereafter affirmed by the New York Court of Appeals on May 31, 1956, which makes decretal findings and directions and monetary awards in favor

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[11] *Park* v. *Park*, 80 N. Y. 156.

of respondent Patricia W. Vanderbilt, should be modified by striking the same therefrom and by denying said respondent relief under Civil Practice Act Sec. 1170-b; and by vacating or terminating the order entered in said Clerk's office on April 21, 1954 appointing the respondent Thomas F. McCoy, Esq. as Receiver and Sequestrator of petitioner's property; and by directing him to finally account to petitioner for his acts and transactions as such.

Dated: March 15, 1957.

Respectfully submitted,

Sol A. Rosenblatt,
Attorney for Petitioner,
630 Fifth Avenue,
New York 20, N.Y.

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Charles Roden,
Counsel for Petitioner.

APPENDIX

New York Civil Practice Act:

Sec. 232(1). (Extract) **In what actions order for service of summons by publication may be made.** An order directing the service of a summons upon a defendant, by publication, may be made upon the application of the plaintiff, as specified in sections two hundred thirty-two-a and two hundred thirty-two-b of this act, in any of the following actions:

1. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation. * * * *

Sec. 232-a(5). (Extract) **Persons against whom order for service of summons by publication may be made.** The order may be made where in a cause of action specified in section two hundred thirty-two of this act, the defendant . . .

5. Is a natural person and is not a resident of the state; or * * * *

Sec. 1161. (Extract) **Action for separation; when maintainable.** An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, forever, or for a limited time, for any of the following causes: * * * *

Sec. 1164. **Maintenance of wife and children in action for separation.** Where an action for separation from bed and board is brought by the wife, the court, in the final judgment of separation, may give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage and for

the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties. And the court, in such an action, may render a judgment compelling the defendant to make the provision specified in this section where, under the circumstances of the case, such a judgment is proper, without rendering a judgment of separation. * * * *

Sec. 1165-a. (Extract) **Conditions attached to maintenance of action for annulment or separation.** An action to annul a marriage or for separation may be maintained in either of the following cases:

1. Where both parties are residents of the state when the action is commenced. * * * *

3. Where the parties were married without the state, and either the plaintiff or the defendant is a resident of the state when the action is commenced, and has been a resident thereof for at least one year continuously at any time prior to the commencement of the action.

Sec. 1166. **Residence of married woman in action for divorce or separation.** If a married woman dwells within the state when she commences an action against her husband for divorce or separation, she is deemed a resident thereof, although her husband resides elsewhere.

Sec. 1171-a. (Extract) **Sequestration of defendant's property in action for divorce, separation, or annulment where defendant cannot be personally served and there is property within the state.** Where in an action for divorce, separation, annulment or declaration of nullity of a void marriage it appears to the court that the defendant is not within the state, or cannot be found therein, or is concealing himself therein, so that process cannot be personally served upon him, the court may at any time and from time

to time make any order or orders without notice directing the sequestration of his property, both real and personal and whether tangible or intangible, within the state, and may appoint a receiver thereof, or by injunction or otherwise take the same into its possession and control. The property thus sequestrated and the income therefrom may be applied in whole or in part and from time to time, under the direction of the court and as justice may require, to the payment of such sum or sums as the court may deem it proper to award, by order or judgment as the case may be, and during the pendency of the action or at the termination thereof, for the education or maintenance of any of the children of a marriage, or for the support of the wife, or for her expenses in bringing and carrying on said action and the proceedings incidental thereto or connected therewith; and if the rents and profits of the real estate, together with the other property so sequestrated, be insufficient to pay the sums of money required, the court, upon such terms and conditions as it may prescribe, may direct the mortgage or sale of sufficient of said real estate to pay such sums. * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1956

No. 302

CORNELIUS VANDERBILT, JR.,
Petitioner,

v.

PATRICIA W. VANDERBILT,
and
THOMAS F. McCOY, Receiver and Sequestrator,
Respondents.

PETITIONER'S REPLY BRIEF ON CERTIORARI

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Respondents.

PETITIONER'S REPLY BRIEF

1.

The Nevada Domicile.

Respondent's brief does not reveal that the courts below conclusively found upon the evidence that petitioner had been domiciled in Nevada for many years up to and during the early months of the marriage. Its statement of chronology is in error. A brief resume of certain of the judicial findings below is stated hereinafter.

Findings by the Trial Court: The testimony and documentary evidence established defendant's residence and domicile in Nevada for some years prior to the divorce. Many years prior to the marriage defendant had planted his "grass roots" in Nevada and continued this conduct "to a great extent" even after the marriage (R. 504-505).

Findings by the Trial Court and the Appellate Division: At the time of the marriage, defendant was domiciled in Nevada and plaintiff was domiciled in California. A few months after the marriage they became jointly domiciled in California (R. 506, 529).

Findings by the Court of Appeals: There was sufficient evidence to justify the findings below as to defendant's good faith domicile in Nevada. "That proof included a showing that defendant had lived and voted and owned property in Nevada for many years before his marriage to plaintiff, *that plaintiff and defendant lived there together in the early months of their marriage,* that defendant returned there some months before the divorce and that defendant has continuously maintained a residence in Nevada since the divorce." (R. 542); (Emphasis supplied).

The Evidence: In addition to conclusive documentation and testimony supporting the bona fides of petitioner's Nevada residence, there was documentation as to respondent's Nevada residence. In 1949 she gave Reno, Nevada, as her residence when applying for an automobile operator's license in California (R. 144; Def. Ex. B). In 1950 plaintiff applied in California for a nonresident's registration of her Nevada motor vehicle (R. 145-146; Def. Ex. C). In the parties' joint 1949 and 1950 federal income tax returns they both stated Reno, Nevada, to be their place of residence (R. 274-275; Def. Ex. F, par. 3, pp. 17-18; Adm. R. 230).

The facts are crystal clear, that the parties were jointly domiciled as husband and wife during the marriage only in the States of Nevada and California, and that no other State ever had anything to do with the marriage, except for the performance of the marriage ceremony in Connecticut.

2.

The Penalty of 1170-b.

Section 1170-b imposed a penalty upon petitioner for invoking the federal constitution as a defense to the action.

By its express terms, only if the petitioner defended the separation action upon the grounds that it was barred by the Nevada decree which was entitled to full faith and credit, does that statute come into play.

Defendant would have been compelled to default or otherwise submit to the separation claim, if he did not wish to be subjected to Sec. 1170-b. Plaintiff's complaint did not question the Nevada decree. She did not assume her affirmative burden to plead an alleged defect in the Nevada decree in order to come within Sec. 1170-b as an alternative to a separation judgment. Thus, the burden was thrust upon defendant to assert as a defense his constitutional rights and at his peril.

If defendant had defaulted in answering to the complaint and plaintiff had proved her separation cause to the satisfaction of the trial court, she might have been awarded a separation judgment as a married woman and statutory alimony as such. Defendant had the unpleasant alternative of fighting the separation claim as a married man and thus nullifying the effect of his divorce decree. Because the non-resident defendant defied the threat of Sec. 1170-b and interposed his defense of the divorce decree and rested upon his constitutional rights; the penalty of maintenance, as New York alleged justice required, was imposed upon him.

Sec. 1170-b is a harsh and unreasonable weapon to compel a non-resident former husband to fight the separation claim and nullify his divorce decree, or to default, and thus to waive his constitutional defense of full faith and credit, under penalty of exaction of maintenance.

3.

Plaintiff's Change of Theory after Sequestration.

It is surprising that there should have been such complacent acceptance below of the sneak attack upon defendant's property under the label of a separation action. The

opinion of the Court at Special Term, rendered upon defendant's initial motion to dismiss the action, reveals (133 N. Y. S. 2d 314) that defendant sought to vacate the sequestration upon the grounds that the Court lacked jurisdiction of the subject matter and of his person, and that the seizure of his property violated his rights under the federal constitution. That Court's decision permitted defendant to preserve his jurisdictional objections throughout the action while defending himself upon the merits. That Court undisturbedly observed that plaintiff belatedly conceded that she might attempt to secure relief under 1170-b, even though her initial processes and instruments of seizure of defendant's property made no disclosure of this.

In *Schuster* v. *Schuster,* (1950) 9 N. J. Super. 11, the plaintiff wife sued for a divorce and obtained personal jurisdiction of the husband, who thereafter became a nonresident of New Jersey during the pendency of the action. Subsequently, as the result of a statute enacted also during the pendency of the action, plaintiff amended her complaint so as to add a cause of action for support and maintenance. The Court, citing *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. ed. 565, held it to be a violation of the due process clause of the federal constitution to permit the addition of a different cause of action for separate maintenance against a nonresident, even though he appeared generally in the divorce action.

Much graver is the violation of due process herein. The Court had no personal jurisdiction of petitioner and seized his property solely for the in rem purposes of the separation action. The purposes were thwarted by the subsequent occurrences which converted the action into one for relief for a divorced woman under Sec. 1170-b.

The continued seizure and retention of defendant's property after judgment dismissing the separation claim and sustaining the Nevada divorce could not be for any genuine in rem purposes. There was no attachment for the

purposes of Sec. 1170-b, but an arbitrary deviation of defendant's property, as an afterthought, to the judgment of maintenance.

The Divisible Divorce.

In order to have a divisible divorce there must be a divisible mariage. Nevada and California say that after the rendition of the divorce decree making no support provisions, the support duty dies with the marital status. New York, an interloper in the marital affairs of these parties, welcomes the nonresident Mrs. Vanderbilt and offers her new financial opportunities.

The morality of a husband's duty to support his wife is not the basis of any legal right in the wife to sue a husband for maintenance in New York. As the cases cited at pages 17 and 18 of our main brief disclose, the wife may not sue her husband for maintenance in an action independent of the award of the main relief of separation or divorce. The statutory relief of alimony is merely incidental to the wife's victory in the matrimonial action. C. P. A. Secs. 1164, 1155; *Fein* v. *Fein*, 261 N. Y. 441.

The wife's sole common law remedy in New York is to sue for the amount already expended by her for necessaries upon the theory of her implied agency for her husband.

It is not fair that a general duty to support should be held to independently survive a divorce decree and be the basis of subsequent attachment, when all during the marriage that duty could not be the subject of suit for its direct enforcement.

In other words, if a woman is married, she may not sue for maintenance. In New York, her suit must seek a separation or divorce. Alimony then flows in consequence. But if the woman be already divorced by her husband through foreign ex parte decree, then all she has to do is to pretend with the State that she is still a married woman, and if the

man should be so bold as to raise a constitutional defense of full faith and credit resting upon the divorce decree, then she procures maintenance under Sec. 1170-b. The statute is flexibly designed to trap the husband in either event.

The form of the remedy is objectionable because of its essential unreasonableness and arbitrary application herein to the nonresident petitioner.

4.

New York Public Policy.

The public policy of New York is confusing. Even the Court of Appeals, cautiously and with limitation, said below, that Sec. 1170-b only has changed the public policy *to the exent that it applies* (R. 547).

We say that New York has no reasonable or consistent public policy upon which Sec. 1170-b is founded. Sec. 1170-b has been enforced herein as a legislation of policy discriminatorily operating upon a marriage between two nonresidents over whom New York never had joint jurisdiction.

As we have shown in our main brief, a New York ex parte divorce judgment is conclusive upon the defendant who may not subsequently commence a counter-action as though the marital status still existed. No statute has written Sec. 1170-b into New York divorce judgments as a reservation.

A New York judgment may not be vacated after the expiration of two years since its entry. *Gysin* v. *Gysin*, 263 N.Y. 509.

New York Civil Practice Act, Sec. 528, is strict in its application. Its pertinent provisions are as follows:

> "A motion to set aside a final judgment, for error in fact not arising upon the trial, shall not be heard, . . . after the expiration of two years since the filing of the judgment roll, . . ."

It is inconceivable that a New York husband's ex parte divorce judgment, years later (perhaps after his witnesses as to the wife's adultery had died), would be subject to a New York separation action by his wife, coupled with a claim that according to Sec. 1170-b justice required that she be maintained by the former husband.

New York has subjugated the laws and decrees of other States to its own purposes. It did so herein upon the solicitation of a visiting spouse who made no effort to seek relief against her non-resident husband in any State of the marital domicile.

The unreasonableness of New York's action herein is all the more apparent when it is observed that Sec. 1170-b was not even enacted when the parties were physically separated in California in September 1952.

5.

(A) Lest there be any misconception about it, we should like to reiterate that it very plainly appears, both in the trial Court's first decison and in its judgment, that the claim as to a separation was dismissed *upon the merits* (R. 3, 344). How could defendant contest the charges of misconduct once they were dismissed on the merits, and plaintiff denied a separation? It is just not reasonable nor within the gamut of legal experience to assert that one has had an opportunity to answer charges in full trial upon the merits after those charges have been dismissed. This is just another casual innovation of theory, to force a liability.

(B) Respondent's brief raises the rather tenuous and farfetched contention that because the separation claim was dismissed, petitioner may not attack the award of maintenance. It hardly could be expected that a successful party should or could appeal from that portion of a judgment which sustained his claim that faith and credit be

given to his Nevada decree. Petitioner did not seek affirmative relief in the action. He is defending himself and his property from assault. Moreover, this contention was not made upon the appeal below.

(C) Reference in respondent's brief to Nevada enabling support statutes have nothing to do with the decree of divorce granted petitioner. That latter form of decree has been held in Nevada and New York to cut off all rights of the divorced woman to support although the issue of support has not been litigated or made subject of other judicial disposition. See: *Lynn* v. *Lynn*, 302 N. Y. 193, at pp. 201-203, and cases there cited; (cert. den. 342 U. S. 849).

Conclusion

The dissenting opinion below of Judge FULD (R. 548) again deserves special attention in connection with what we have said in this reply. He wrote the majority opinion in *Lynn* v. *Lynn*, 302 N. Y. 193, and joined in the affirming opinion in *Estin* v. *Estin*, 296 N. Y. 308 (affd. 334 U. S. 541).

Judge FULD holds up a stop signal to judicial efforts to force an extraterritorial support policy. He shows that in New York State "The duty of support flows from the marital status;" and "in itself furnishes no foundation for a cause of action" (R. 549).

Judge FULD also points out that the limitations of the decisions in *Estin* v. *Estin* (*supra*) and *Lynn* v. *Lynn* (*supra*) were to preserve the property right vested in the wife by the prior support order, which could not be extinguished by a subsequent divorce judgment in the absence of personal jurisdiction over the wife (R. 550).

Judge FULD expressly states that he cannot agree with Judge BLACK's conclusion in *Armstrong* v. *Armstrong*, 350 U. S. 568, 575, *et seq.*, to the effect that a denial of alimony is a personal judgment depriving a woman of a right.

Judge FULD aptly summed the opposition to that conclusion as follows:

> "I cannot accept that reasoning, for it seems to me to rest on the erroneous premise that a mere incident of the marital status, which 'in itself furnishes no foundation for a cause of action' (*Querze* v. *Querze*, *supra*, 290 N. Y. 13, 18), is the equivalent of an independent right."

A New York, California or Nevada woman found guilty of misconduct sacrifices enforcement of the support duty. Nevada adjudicated the misconduct of this plaintiff. New York thereafter had no valid basis for treating the plaintiff as a married woman in order that she might synthetically conform to its statutory jurisdictional and other requirements for the maintenance of a separation action. Sec. 1170-b was expressly designed to frustrate the effect of foreign ex parte divorce decrees. So long as it might have sought to protect the genuine New York wife against the errant New York husband, we believe its purpose had merit, although its method be wrong. When applied, as it was herein, to nonresidents, it is deceptive, arbitrary, unreasonable and unconstitutional.

Respectfully submitted,

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No. 302

CORNELIUS VANDERBILT, JR.,
Petitioner,

—vs.—

PATRICIA W. VANDERBILT,
Respondent,

—and—

THOMAS F. McCOY, Receiver and Sequestrator.

BRIEF OF RESPONDENT PATRICIA W. VANDERBILT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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—vs.—

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Respondent,

—and—

THOMAS F. McCOY, Receiver and Sequestrator.

BRIEF OF RESPONDENT PATRICIA W. VANDERBILT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT

The parties were married in Connecticut in September, 1948. They then came to live in New York where they resided from time to time (R., fols. 161-162, 195-200). Although they travelled extensively in this country and abroad, they never set foot in the State of Nevada during their married life (R., fols. 1061-1062). In September, 1952, while they were residents of California, petitioner (husband) abandoned the respondent (wife) (R., fols. 383-399). After the abandonment, respondent returned to New York in February, 1953, where she continued to reside up to the present time (R., fols. 402-418).

Respondent is destitute and has been obliged to rely upon charitable assistance in New York [1] for her support.

On March 5, 1953, petitioner purported to establish a residence in Nevada, and on June 30, 1953, he procured a decree of divorce in that state upon constructive service of process.[2] Respondent did not appear, answer or defend the Nevada divorce action, and therefore, the Nevada court did not obtain jurisdiction of the person of the respondent herein.

It is significant to note with respect to the Nevada divorce decree, that:

(1) The complaint was silent on the subject of alimony;

(2) The testimony taken at the hearing of the divorce proceedings contained no reference to the subject of alimony; and

(3) There was no decree as to alimony. (Deft.'s Ex. A; R., fol. 150.)

This action for a separation and maintenance was commenced in the New York Supreme Court in April, 1954, by publication against respondent, the non-resident defendant herein. (In this action respondent is the plaintiff and petitioner is the defendant.) Jurisdiction to make the awards contained in the judgment was based upon the sequestration and seizure of defendant's property within the State of New York.[3]

Defendant appeared specially herein and moved to dismiss the complaint and to vacate the orders for publication and sequestration for lack of jurisdiction of the person of the defendant and the subject of the action. The order entered upon the denial of that motion was not appealed from.[4]

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[1] Petition, A-29: "For the purpose of enforcing the husband's obligation there is interest and jurisdiction in New York enough—more so now that the wife is a public charge in this State."

[2] Deft.'s Ex. A; R., fol. 150.

[3] Pltf.'s Ex. 11; R., fol. 493.

[4] Petition, A-53-A-57.

Thereafter, defendant interposed his answer which included affirmative defenses, and vigorously defended the action on the merits during a trial which consumed seven days.

During the trial, the court ruled in a separate opinion[5] that a separation is barred by defendant's *ex parte* Nevada divorce decree, and continued the trial for the determination of the remaining issues relating to plaintiff's right to maintenance and the amount thereof. After the trial, judgment was rendered denying the separation by reason of the Nevada divorce decree, but awarding maintenance to the plaintiff pursuant to Section 1170-b[6] of the New York Civil Practice Act, which became effective on April 13, 1953.[7]

Significant statements made in the petition without support in the record, merit the attention of this Court.

(1) This is not an *ex parte* action as contended by petitioner. Defendant joined issue herein by service of an answer, and throughout the seven-day trial, his counsel was in attendance and vigorously contested this action on the merits. He cross-examined plaintiff and her witnesses at great length; he objected to the introduction of evidence; and he presented evidence in support of his defenses. His participation was by no means confined to the jurisdictional objections first raised by him.

(2) The complaint was not dismissed at the end of plaintiff's case. The trial court ruled that a separation was barred by reason of defendant's *ex parte* Nevada divorce decree, and dismissed the complaint only with respect to the issues bearing on her right to a separation; however, the trial was continued for the purpose of determining the remaining issues bearing upon plaintiff's right to maintenance as demanded in the complaint.[8]

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[5] Petition, A-34.
[6] Petition, A-57.
[7] Petition, A-37; A-65.
[8] Petition, A-36.

(3) Despite defendant's suggestion to the contrary, there is nothing unnatural or sinister for plaintiff to have made her domicile in New York after defendant's abandonment of her. Plaintiff is not a stranger to New York, having resided there with defendant during their married life for considerable periods of time and on frequent occasions. The Appellate Division made an exhaustive review of the relationship of the parties to New York and their residence there, and found that the parties had a nexus with New York,[9] aside from the fact that plaintiff had established her domicile in New York.

(4) Nevada never was the actual marital domicile of the parties. Despite the fact that defendant gave his residence as Nevada in the Connecticut marriage certificate,[10] the uncontradicted evidence shows that the parties never resided in Nevada as husband and wife.[11]

The use made in the petition of references to the prior separation action, and the denial of an injunction in that action is misleading, because both are wholly irrelevant to this action. The prior action was commenced on October 1, 1952, and was dismissed on February 27, 1953, solely on the jurisdictional ground that the statutory residential requirements had not been established as of the date of the commencement of that action.[12] The injunction sought by plaintiff in the prior action to enjoin defendant's prosecution of the Nevada action was denied on July 3, 1953 for the two-fold reason that the action had already been dismissed for lack of jurisdiction, and that the Nevada action had already proceeded to judgment on June 30, 1953, thus rendering moot the motion to enjoin the prosecution thereof.[13]

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[9] Petition, A-28; A-29.
[10] Pltf.'s Ex. 1; R., fol. 159.
[11] R., fols. 1061-1062.
[12] Deft.'s Ex. G; R., fol. 895.
[13] Deft.'s Ex. H; R., fol. 910.

ARGUMENT

POINT I

NEVADA DID NOT ADJUDICATE ON THE SUBJECT OF ALIMONY. HENCE, THE AWARD OF ALIMONY BY NEW YORK PRESENTS NO QUESTION UNDER THE FULL FAITH AND CREDIT CLAUSE.

The decision of this Court in *Armstrong* v. *Armstrong*, 350 U. S. 568, is controlling that no question is here presented under the full faith and credit clause of the Constitution.

In the *Armstrong* case, the husband obtained a divorce in Florida, where the complaint, the master's report and the decree referred to the subject of alimony, but the decree awarded no alimony to the wife. Subsequently, in a suit by the wife in Ohio, the Ohio court rendered a decree recognizing the validity of the Florida divorce decree, but awarded maintenance to the wife. On certiorari, this Court held that there was no adjudication by the Florida court with respect to alimony, and that in the absence of such adjudication, a subsequent award of alimony by the Ohio court presented no question to be determined by this Court as to whether full faith and credit was denied the Florida divorce decree.

In the case at bar, an *a fortiori* situation is presented by reason of the fact that the judgment roll of the Nevada action shows that the complaint, the evidence at the trial, the findings and the decree are all silent on the subject of alimony.[14] The Nevada divorce decree adjudicated the marital status only—it did not adjudicate either a grant or denial of alimony. Hence, the Nevada court made no decree as to alimony.

The Nevada court, not having adjudicated on the absent wife's right to maintenance, its decree was accorded full faith

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[14] Deft.'s Ex. A; R., fol. 150.

and credit by New York when it upheld the decree as a valid adjudication as to the marital status. In awarding maintenance to the wife in this action, New York adjudicated upon a right which the Nevada court did not consider nor decide.

It is evident, therefore, that upon the authority of the *Armstrong* case no federal constitutional question is presented here with respect to the full faith and credit clause.

POINT II

ASSUMING, ARGUENDO, THAT THE NEVADA COURT ADJUDICATED AND DENIED ALIMONY TO THE WIFE, THE FULL FAITH AND CREDIT CLAUSE WAS NOT VIOLATED, BECAUSE NEVADA LACKED JURISDICTION OF THE PERSON OF THE WIFE.

Concededly, the husband's divorce decree was an *ex parte* decree, based upon constructive service of process, and without jurisdiction having been obtained of the person of the wife.

It has long been the constitutional rule that the personal rights of an absent non-resident cannot be affected without personal service of process within the state of the forum, or an appearance equivalent thereto. (*Pennoyer* v. *Neff*, 95 U. S. 714.)

This Court, in *Estin* v. *Estin*, 334 U. S. 541, held that the rights of a wife to alimony derived from a New York separation judgment could not be extinguished or altered by a subsequent *ex parte* divorce judgment rendered in Nevada, wherein personal jurisdiction of the wife was not obtained.

The only difference between the facts in the *Estin* case and those presented here is, that here, the wife, a domiciliary of New York, had not procured a judgment for alimony prior to the rendition of the Nevada *ex parte* divorce decree in favor of the husband.

Plaintiff's right to support, unreduced to judgment, like Mrs. Estin's right to support after judgment, is the kind of

personal right which cannot be adjudicated without personal jurisdiction having been first acquired over her.[15]

There can be no distinction, in law or in reason, between a legal right, prior to judgment, and such right after judgment, insofar as concerns the protection thereof under the due process clause. Both are personal rights which cannot be altered, extinguished or divested without due process of law. Lacking *in personam* jurisdiction of the wife, the Nevada court could not, by its *ex parte* judgment, constitutionally extinguish her personal right to maintenance.

Thus, if we assume that the Nevada court considered the question of alimony and decided the question adversely to the wife, it lacked the jurisdictional power to adjudicate on that personal right of the wife. The full faith and credit clause does not compel New York to recognize an adjudication by Nevada on a matter which Nevada did not have jurisdiction to decide.[16]

POINT III

SECTION 1170-b OF THE NEW YORK CIVIL PRACTICE ACT PERMITTING AN AWARD OF MAINTENANCE TO THE WIFE AFTER AN EX PARTE DIVORCE IN FAVOR OF THE HUSBAND DOES NOT IMPAIR ANY CONTRACTUAL RIGHTS OF THE HUSBAND.

Defendant makes the unsound claim that Section 1170-b imposes upon him a new marital obligation.

Defendant's obligation to support plaintiff, and her right to be supported by him, springs, not from any statute, but from the marriage itself.[17] We have already shown that it is

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[15] *Cf. May* v. *Anderson*, 345 U. S. 528; see *Hopson* v. *Hopson*, 221 Fed. (2nd) 839, 844.

[16] *Williams* v. *North Carolina*, 317 U. S. 287, 325 U. S. 226; *Esenwein* v. *Esenwein*, 317 U. S. 207; *Kreiger* v. *Kreiger*, 334 U. S. 555; *Barber* v. *Barber*, 21 How. 582; *Barrett* v. *Failing*, 111 U. S. 523, 525.

[17] *Garlock* v. *Garlock*, 279 N. Y. 337, 340; *Haas* v. *Haas*, 298 N. Y. 69, 71.

the prevailing law that plaintiff's right to maintenance was not extinguished by defendant's *ex parte* divorce decree obtained without personal jurisdiction over her. Section 1170-b, therefore, did not impose any obligation, retroactively or otherwise, which defendant did not already have before that statute was enacted. The statute merely permitted plaintiff to enforce the unextinguished existing obligation of defendant to support her.

New York has the right to declare that the unextinguished obligation of defendant to support plaintiff, a domiciliary, may be enforced after the rendition of the husband's *ex parte* divorce decree. In enacting Section 1170-b, the New York Legislature established that it is the public policy of New York that the support obligation survives an *ex parte* divorce obtained by the husband without personal jurisdiction of the wife, and it also established the procedure for the enforcement of that obligation. The court below, in affirming the judgment, leaves no doubt that such is the public policy of New York today, regardless of what may have been its policy in the past.[18]

POINT IV

SECTION 1170-b IS NOT DISCRIMINATORY.

Defendant erroneously contends that Section 1170-b is directed only against *ex parte* ivorces obtained in other states, and that the statute would not be applied to such divorces obtained in the State of New York. On the basis of that false premise defendant concludes that the statute is discriminatory and unconstitutional.

The statute is clear and unambiguous, applying with equal effect to divorce decrees obtained (without personal jurisdiction of the wife) in the State of New York, as well as those rendered in other states. In fact, this statute was drafted with special regard to avoid such discrimination, as appears

[18] Petition, A-9.

from the Report of the New York Law Revision Commission which recommended the enactment of that statute by the New York Legislature.[19]

Moreover, the court below, in construing that statute, has held that the statute is non-discriminatory, stating (Petition, A-8):

> "As to defendant's first assumption, there is nothing in our statute to support the conclusion that it is inapplicable where the prior judgment was obtained in New York."

In determining the constitutionality of a state statute, the interpretation placed upon such statute by the highest court of that state is controlling.[20] The construction placed upon the statute by the court below clearly overcomes defendant's specious claim of discrimination.

POINT V

BY VIRTUE OF PLAINTIFF'S DOMICILE IN NEW YORK, THE COURT BELOW HAD JURISDICTION TO RENDER JUDGMENT HEREIN IN ACCORDANCE WITH THE PUBLIC POLICY AND LAWS OF THE STATE OF NEW YORK.

Defendant makes the fallacious argument that because New York is not the matrimonial domicile of the parties, it lacked jurisdiction to render the judgment herein in accordance with the laws of the State of New York.

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[19] (Leg. Document (1953) No. 65(K)): "In order to avoid discrimination against foreign divorces against which the Estin opinion warned, such legislation should be made applicable whether the husband's *ex parte* adjudication of marital status was obtained in a foreign or a New York court."

[20] *State of Minnesota* v. *Probate Court*, 309 U. S. 515; *Supreme Lodge* v. *Meyer*, 265 U. S. 30, 32.

Although the parties resided in California at the time of the abandonment, thereafter, the abandoned plaintiff established a domicile for herself in the State of New York. The trial court and the Court of Appeals found that plaintiff was domiciled in the State of New York.[21]

Under the well-recognized rule, plaintiff, upon being abandoned, had the right to establish her own domicile in New York, and in doing so, New York acquired jurisdiction to determine her marital rights in accordance with its own laws and public policy.[22]

After having abandoned the plaintiff in California, defendant himself established a unilateral domicile in Nevada, upon which he rests the jurisdictional basis for the divorce decree which is now urged by him as a defense in this action.

If unilateral domicile of the husband is sufficient to confer upon Nevada the jurisdictional basis to render a valid divorce in accordance with its own laws, by the same token, New York, with the same jurisdictional basis, had jurisdiction to render the judgment herein in accordance with *its* laws. The rule of jurisdiction and the applicability of the law of the forum, must be consistently applied to both judgments.

Defendant makes the untenable claim that plaintiff had no right, under the New York statute, to maintain this action. The trial court found that plaintiff was a domiciliary and resident of this state for more than one year prior to the commencement of this action. That court also found that she was a resident of this state at the time when Section 1170-b became effective.[23]

The question as to whether or not plaintiff brought herself within the provisions of the New York Civil Practice Act governing her eligibility to maintain this action, is a procedural

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[21] Petition, A-8, A-38.

[22] *Williams* v. *North Carolina*, 317 U. S. 287, 325 U. S. 226; *Hunt* v. *Hunt*, 72 N. Y. 217, 242, 243; *Dean* v. *Dean*, 241 N. Y. 240, 244; *Daggett* v. *Daggett*, 255 N. Y. 243, 247.

[23] Petition, A-46.

matter which is purely a state and not a federal question.[24] The courts below having made such determination in favor of the plaintiff, such determination is not a proper subject for review by this Court.

POINT VI

THE REMAINING CONTENTIONS RAISED BY DEFENDANT LIKEWISE RAISE NO FEDERAL CONSTITUTIONAL QUESTION.

Defendant was not deprived of a fair trial.

Defendant makes the baseless claims that the complaint was dismissed at the close of plaintiff's case and that he had no opportunity to answer the charges of his misconduct. Such claims are belied by the fact that defendant's attorney spent every day of the seven-day trial exerting every effort to obtain a judgment favorable to the defendant, not only on jurisdictional grounds, but also on the facts as well as on the merits.

The record shows that the complaint was not dismissed at the close of plaintiff's case. The trial court ruled that a separation was barred by the Nevada *ex parte* decree, and continued the trial for the purpose of determining the remaining issues relating to plaintiff's right to maintenance and the amount thereof.[25]

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[24] *Central Vermont Ry. v. White*, 238 U. S. 507, 511, where this Court stated: "It is settled law that a decision resting on State procedure on matters affecting the remedy sought to be enforced are governed by the law of the forum, and a decision of a State court on matters of State pleadings or practice is not reviewable by this court and does not present a federal question."

[25] Petition, A-36: "The first affirmative defense of the defendant, therefore, is a bar to the plaintiff's action for a separation, and, being sustained, the complaint bearing on this issue must be dismissed upon the merits.

* * * * *

After the ruling above referred to was made, the trial was resumed, and on at least three separate occasions thereafter, the trial court informed defendant's counsel that he was at liberty to adduce any evidence that he desired to bring to bear on the issue of maintenance, if any, to be awarded to plaintiff.[26]

Defendant made similar arguments below in the Appellate Division and in the Court of Appeals. Both courts found that there was nothing in the record to support such claims.[27]

Defendant had adequate notice of this action which fully satisfied the requirements of due process.

All of the essentials for due service upon defendant by publication were fully complied with, and defendant has made no attack on the sufficiency of the order for publication nor on the manner the service of process was made pursuant thereto.

There has been compliance with all requirements of due process because service by publication effectively gave notice to defendant of the commencement of this action and afforded him an opportunity to defend. (*Mullane* v. *Central Hanover Bank & Trust Company*, 339 U. S. 306.)

In addition to the notice to defendant of the commencement of this action afforded by publication, defendant received additional notice when his property was seized under the

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"However, pursuant to the provisions of the statute particularly and specifically section 1170-b of the Civil Practice Act, in cases such as this made and provided, I will take the proof from both parties as to their incomes and earnings, and such other information as may be required and pertinent in connection with the issue of maintenance and support to be awarded, if any, to the plaintiff."

[26] R., fols. 1346, 1347, 1349, 1370.

[27] Petition, A-10, A-22. The Appellate Division stated (A-22n): "On this appeal the husband contends that he had no opportunity to meet these issues, but that is not so. The trial court clearly indicated that after it would decide the motion to dismiss at the close of the wife's case, the husband could meet any issues that he considered relevant."

order of sequestration.[28] In *Granis* v. *Ordean*, 234 U. S. 385, this Court stated (394):

> "The fundamental requisite of due process is the opportunity to be heard."

The best evidence that there is no lack of due process here, and that defendant had ample notice and full opportunity to be heard, is found in the fact that the order for publication was signed on April 21, 1954, and on April 30, 1954, defendant's attorney served a notice of appearance. Thereafter, he served an answer and his counsel actively participated throughout the trial.

The Court of Appeals reviewed this claim of lack of due process, and ruled that it was without merit. That court held that adequate notice was given to the defendant by the complaint and by the statute itself which "warned that if a separation should be refused because of the foreign divorce judgment, maintenance might still be awarded."[29]

It is nothing short of sheer nonsense for the defendant to urge lack of due process, after he has had actual notice of every stage of this action; after he has had a full opportunity to defend; and after he has most vigorously defended this action every inch of the way.

The finding of misconduct is warranted by the record and was not precluded by the ex parte Nevada divorce decree.

Defendant contends that the Nevada judgment was conclusive on the merits as to everything but jurisdiction, and suggests that error was committed by the finding of misconduct on the part of the defendant.

Defendant cites no authority in support of that claim. The prevailing law is to the contrary. The Nevada action was

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[28] *Mathews* v. *Mathews*, 247 N. Y. 32; *Geary* v. *Geary*, 272 N. Y. 390.
[29] Petition, A-10.

in rem, without personal jurisdiction over the absentee wife. The effect of any finding of fact made by the Nevada court is limited to the *res* before the court, and is not personally binding upon the absentee wife, nor is it conclusive upon her in any subsequent litigation between the parties. The court below so held in accordance with firmly established law.[30]

The court below has interpreted the phrase, "as justice may require," [31] contained in Section 1170-b, as conferring a power upon the New York Supreme Court, consistent with the broad and comprehensive powers of that court, preserved by the State Constitution and the Civil Practice Act.[32] The objection raised by defendant with respect to that statute does not present a federal question.[33]

CONCLUSION

FOR THE REASONS ADVANCED, THE PETITION SHOULD BE DENIED.

Respectfully submitted,

MONROE J. WINSTEN,
Counsel for Respondent,
Patricia W. Vanderbilt.

Of Counsel:
MONROE J. WINSTEN,
CHARLES L. RASKIN.

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[30] Petition, A-9. *Durant* v. *Abendroth*, 97 N. Y. 132, 141; *Matter of Holmes*, 291 N. Y. 270, citing Restatement of Judgments, Sec. 74.

[31] Petition, A-10.

[32] New York State Constitution, Art. 6, Sec. 1; New York Civil Practice Act, Sec. 64.

[33] *State of Minnesota* v. *Probate Court*, 309 U. S. 515, 525: "This construction is binding upon us. Any contention that the construction is contrary to the terms of the Act is unavailing here. For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it."

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IN THE

Supreme Court of the United States

October Term, A. D. 1956

No. 302

CORNELIUS VANDERBILT, JR.,
Petitioner,

—v.—

PATRICIA W. VANDERBILT,

—and—

THOMAS F. McCOY, Receiver and Sequestrator,
Respondents.

RESPONDENT'S BRIEF ON CERTIORARI

MONROE J. WINSTEN,
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MONROE J. WINSTEN,
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Counsel for Respondent.

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Respondents.

RESPONDENT'S BRIEF ON CERTIORARI

Question Presented

Does the New York judgment herein, which awarded alimony to respondent and recognized petitioner's prior Nevada *ex parte* divorce decree in so far as it dissolved the marital status, deny full faith and credit to the Nevada decree?

Statement

Petitioner (husband) seeks review of that portion of the judgment of the New York Supreme Court dated March 30, 1955 (R. 2), affirmed by the New York Court of Appeals (R. 554, 556), as awards respondent Patricia W. Vanderbilt

(wife) maintenance and counsel fees, and as directs the sequestrator to pay the same (R. 1, 523). That judgment also sustained the validity of petitioner's *ex parte* Nevada divorce decree, but petitioner does not seek review of that part of the judgment (R. 3).

Respondent brought this action for a separation and for maintenance on the grounds of cruelty, abandonment and non-support (R. 12). Petitioner being a nonresident, and not found within the State of New York, service of the summons was made pursuant to an order for publication (R. 10), and jurisdiction to make a money award to respondent was acquired by sequestration and seizure of petitioner's assets and property within New York pursuant to an order of sequestration (R. 5). Both orders are dated April 21, 1954.

On April 30, 1954, petitioner served a notice of special appearance (R. 17), and followed it by a motion to dismiss the complaint and to vacate the orders of publication and sequestration on the grounds that the court lacked jurisdiction of the person of petitioner and the subject of the action. In challenging such jurisdiction, petitioner did not attack the sufficiency of the publication and sequestration papers or the regularity of the proceedings thereunder. This attack was based solely upon the existence of an *ex parte* Nevada divorce decree obtained by petitioner on June 30, 1953, in an action in which jurisdicton of the person of respondent herein had not been acquired. That motion was denied (*Vanderbilt* v. *Vanderbilt*, 133 N. Y. S. 2d 314, not officially reported).

On July 1, 1954, petitioner served his answer setting forth a general denial, and pleading as two affirmative defenses the objections to jurisdiction of person and subject which were overruled on his aforementioned motion (R. 18).

A seven day trial was held in the New York Supreme Court. Both parties presented evidence relating to the validity of petitioner's alleged Nevada domicile. During the course of the trial the court rendered a decision holding that domicile valid and that petitioner's *ex parte* Nevada divorce decree was a bar to respondent's right to a separation (R. 342-5). The court, however, did not dismiss the complaint in its entirety, but continued the trial on the remaining issue of

maintenance in order to ascertain whether or not respondent was entitled to maintenance under Section 1170-b of the New York Civil Practice Act, which became a law on April 13, 1953 (R. 345-6).

Throughout the trial petitioner participated in contesting the action, not only upon the alleged jurisdictional grounds, but also on the merits, encompassing all of the issues raised by the pleadings.

The trial court awarded respondent maintenance under Section 1170-b, New York Civil Practice Act, holding that, although petitioner's Nevada *ex parte* divorce decree was effective to dissolve the marriage, it was not effective to extinguish respondent's right to maintenance (R. 505, 2).

Petitioner appealed to the Appellate Division and the Court of Appeals from the judgment entered herein, except from that part thereof which recognized the validity of his *ex parte* Nevada divorce decree (R. 1, 523). The judgment was affirmed in each instance (R. 524, 554, 556).

The parties were married in Connecticut in September, 1948 (Pltf.'s Ex. 1; R. 33). At that time and from 1945 California was petitioner's domicile (Pltf.'s Ex. 19; R. 277). They then came to live in New York where they resided from time to time (R. 34, 42, 43). Although they traveled extensively throughout this country and abroad they never set foot in the State of Nevada during their married life together (R. 42, 273).

After their marriage, the parties became domiciled in California (R. 45, 541). In September, 1952, while they were so domiciled in California, petitioner abandoned respondent (R. 90-94, 527). Prior to his abandonment of respondent, petitioner committed repeated acts of cruelty which affected her health (R. 46-88). After the abandonment, respondent returned to New York in February, 1953 where she became domiciled and continued to reside up to the present time (R. 41, 96, 541).

Respondent being destitute, she was dependent upon charitable agencies in New York for her subsistence. The

Appellate Division found that respondent was a public charge in the State of New York (R. 537).

On June 30, 1953 petitioner obtained a decree of divorce in Nevada (Deft.'s Ex. A; R. 31). That decree was based upon a residence alleged to have been commenced on March 5, 1953, and upon constructive service of the summons dated June 6, 1953, pursuant to an order for publication also dated June 6, 1953 (R. 314-16 Deft.'s Ex. A; R. 31). Respondent did not appear in, answer, or defend, that action, and the judgment of divorce was entered *ex parte* (R. 273-4, 530); the Nevada court did not obtain jurisdiction of the person of respondent herein (R. 507, 530, 541).

The complaint in the Nevada action did not set forth any facts with respect to an allowance or disallowance of maintenance to Mrs. Vanderbilt, and no evidence was presented and no findings were made in the action with respect thereto. The complaint therein alleges a cause of action for the sole relief of dissolving the marital status, and the decree of divorce makes no mention of alimony (Deft.'s Ex. A; R. 31).

The use, made in petitioner's brief of references to a prior separation action instituted by respondent in New York, and the denial of an injunction in that action, is misleading, because both are wholly irrelevant to this action. The prior separation action was commenced by respondent on October 1, 1952, and was dismissed on February 27, 1953, solely on the jurisdictional ground that the statutory residential requirements had not been established as of the date of the commencement of that action (Deft.'s Ex. G; R. 231). The injunction, sought by respondent in that prior action, to enjoin petitioner's prosecution of the Nevada divorce action was denied on July 3, 1953, for the twofold reason that the action in which that motion was made had already been dismissed for lack of jurisdiction, and that the Nevada action had proceeded to judgment on June 30, 1953, thus rendering moot the motion to enjoin the prosecution thereof (Deft.'s Ex. H; R. 234).

Chronology of Events

1945		
		Petitioner established his domicile in California[1] (Pltf.'s Ex. 19; R. 277).
1948		
September	7	The parties were married (Pltf.'s Ex 1; R. 33).
1950		
January		The parties established their domicile in California (R. 45, 541).
1952		
September		Petitioner abandoned respondent in California (R. 90-94, 527).
1953		
February	12	Respondent established her domicile in New York (R. 41, 96, 541).
March	5	Petitioner allegedly established his residence in Nevada (R. 314-16).
April	13	Section 1170-b, New York Civil Practice Act was enacted and became effective.
June	6	Summons and order for publication issued in petitioner's action for divorce in Nevada (Deft.'s Ex. A; R. 31).

[1] Plaintiff's Exhibit 19: "I am now lecturing in the States in the East in order to be near my mother but it has been and still is my intention to return to my permanent domicile in California as soon as possible. It has always been my intention since I established my domicile in California in or about the year 1945, and still is my intention to maintain California as my permanent domicile and to return there despite the fact that I am obliged for business and personal reasons, to depart therefrom from time to time." (From affidavit of petitioner, dated November 18, 1952.)

June 30 Decree of divorce made and entered in petitioner's Nevada *ex parte* divorce action (Deft.'s Ex. A; R. 31).

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April 21 Order for publication and order for sequestration made in the New York Supreme Court in the instant action (R. 5, 10).

Summary of Argument

The Nevada *ex parte* divorce decree, having been rendered in an action in which personal jurisdiction of respondent was not acquired, was effective only to dissolve the marital status, and ineffectual to diminish or extinguish respondent's personal right to maintenance. In recognizing the Nevada divorce decree as dissolving the marital status, and in awarding maintenance to respondent, the New York court has accorded faith and credit to the Nevada decree to the fullest extent required by the Constitution.

The question of whether or not a state should enforce the unextinguished support obligation after an *ex parte* divorce is not a federal question, but one of state policy. In so dealing with the protection of the rights of its domiciliaries, each state, for itself, has the right to determine such policy without conflicting with the Federal Constitution.

In *Estin* v. *Estin*, 334 U. S. 541, New York had declared its policy to be that the support obligation will be enforced after an *ex parte* divorce decree; but procedural obstacles peculiar to New York prevented the enforcement of that obligation in the absence of a support order obtained prior to the divorce decree. Section 1170-b of the New York Civil Practice Act was enacted to furnish the procedural means by which such support obligation could be enforced where no prior support order existed.

Petitioner's reliance upon *Thompson* v. *Thompson*, 226 U. S. 551, is erroneous. Since this Court's decision of the

Estin case, and its application of the rule of *Pennoyer* v. *Neff*, 95 U. S. 714, to the separable personal right to maintenance, the *Thompson* case, to the extent that it may be construed to hold that the state of the matrimonial domicile may extinguish the right of maintenance of a wife over whom no personal jurisdiction was acquired, is no longer cognizable authority.

Section 1170-b may not be validly criticized on the ground that it authorizes the maintenance of a separation action although the husband may interpose an *ex parte* divorce decree as a defense which may thereafter be sustained. The form of action or remedy is a subject strictly within the sphere of state power, and if the remedy established by the state affords due process of law, the form of action authorized presents no federal question reviewable here.

In authorizing an action for separation, the New York legislature did not deny full faith and credit to petitioner's *ex parte* divorce decree. It merely authorized the maintenance of an omnibus action in which all of the issues may be determined, including the validity of the husband's *ex parte* divorce decree, if it should be tendered as a defense. In such action, the relief may be accommodated to the facts established—a separation may be granted if the husband's divorce decree is not sustained, and a separation would be denied and maintenance may be granted if the divorce decree is sustained.

Respondent's right to maintain this action under the requirements of New York law raises no federal question. The courts below have found that respondent has complied with all procedural conditions precedent imposed by New York law for the maintenance of this action, and such finding is not reviewable here.

Any finding of fact on marital misconduct made in the Nevada *in rem* proceeding with respect to the marital status only is not binding on respondent in this action for a separation and maintenance.

Article I, Section 10 of the Constitution does not apply to the marriage relation.

The Nevada court did not consider either a grant or denial of alimony in the *ex parte* divorce proceeding. No mention is made of alimony in the complaint, testimony, findings or decree. The Nevada alimony statute permitting an award of alimony without regard to marital fault, contemplates an inquiry by the court into the financial resources and needs of the parties regardless of which party is granted the divorce. The absence of such inquiry and any reference to alimony in the Nevada record, supports the presumption that the Nevada court did not adjudicate on that subject, and refrained from so doing because it followed the pronouncements of this Court in the *Estin* case, that jurisdiction was lacking to make such an adjudication. No adjudication having been made on the subject of alimony by the Nevada court, the New York court, in any event, was not foreclosed from making an award of alimony, and on the authority of *Armstrong* v. *Armstrong,* 350 U. S. 568, there is no question here presented under the Full Faith and Credit Clause.

Section 1170-b, neither by its terms, nor as construed by the Court of Appeals in this case, makes any discriminatory distinction between *ex parte* divorce decrees obtained in New York and those rendered in other states. The opinion below expressly states that the statute must be interpreted as applying with equal effect to *ex parte* divorce decrees rendered in New York and elsewhere. The Report of the Law Revision Commission of the State of New York, which accompanied the recommendation for enactment of that statute expressly declares that the statute was drafted so as to apply with equal effect to New York *ex parte* divorce decrees in order that any claim of discrimination may be avoided.

There was no discrimination practiced in the sequestration of petitioner's assets within the State of New York. Section 1171-a, C. P. A., which provides for sequestration makes no distinction between residents and nonresidents. The only criterion is whether the defendant can be found within the state for personal service of process. Furthermore, it is not discriminatory for a state to make a distinction between residents and nonresidents as regards attachment and sequestration.

The requirements of due process were satisfied by giving petitioner adequate notice of respondent's claim against him and a reasonable opportunity to be heard in defense thereof, through service by publication and sequestration of his assets. Petitioner availed himself to the fullest possible extent of his opportunities for defense by making and defending pre-trial motions and appeals, and actively participating in the contest, on the merits, of all of the issues presented by the pleadings during a seven-day trial.

Petitioner was not denied a fair trial. The record shows, and the courts below have found, that petitioner was afforded a full and fair opportunity to present any proof in defense of respondent's evidence of misconduct, which petitioner desired to offer. Petitioner made no offer of such proof, and the record shows that his failure to do so was by design and not the result of preclusion.

The identical phrase "as justice may require" contained in Section 1170-b, is also contained in Sections 1155 and 1170 of the New York Civil Practice Act, which have governed the awards of alimony in New York for many years. This phrase has been interpreted by the Court of Appeals herein as vesting the courts with discretionary power to determine the question of alimony. The New York courts have construed and applied this phrase through the years, and it now has a meaning universally known, and it has attained the significance of a phrase of legal art. The standard is, therefore not new, untried, obscure or indefinite.

In any event, by appealing only from that part of the judgment which affects him adversely, and by accepting the benefits of the same judgment which sustains the validity of the Nevada divorce decree, petitioner has precluded himself from claiming that the judgment was rendered without due process of law.

ARGUMENT

POINT I

THE AWARD OF ALIMONY DOES NOT VIOLATE THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION.

It is petitioner's chief claim that his Nevada decree dissolving the marital status also extinguished his obligation to support respondent, and that the judgment herein, to the extent that it awarded maintenance, is in conflict with the Full Faith and Credit Clause of the Federal Constitution.

It was conceded, and the courts below found, that the divorce decree relied upon by petitioner was made in Nevada in an *ex parte* proceeding wherein jurisdiction of the person of respondent was not acquired (R. 273-4, 507, 530, 541).

The award of maintenance herein is based upon the concept of what is now commonly known as "divisible divorce," which was established by this Court in *Estin* v. *Estin*, 334 U. S. 541. The rationale of the decision in that case rests upon the principle established in *Pennoyer* v. *Neff*, 95 U. S. 714, that the court of a particular state cannot extend its jurisdiction beyond its borders and adjudicate personal rights of nonresidents without first having acquired jurisdiction *in personam* over them. In applying that principle to marriage and divorce this Court held that a divorce decree based upon constructive service without *in personam* jurisdiction of the wife may be effective to dissolve the marital status, but is ineffectual to alter or extinguish the personal right of the absent nonresident wife to maintenance, because of the lack of jurisdictional power to make such determination.[2]

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[2] *Krieger* v. *Krieger*, 334 U. S. 555;
Esenwein v. *Esenwein*, 325 U. S. 279;
May v. *Anderson*, 345 U. S. 528;
Hopson v. *Hopson*, 221 Fed. (2d) 839.

On this subject, this Court stated in *Estin* v. *Estin* (334 U. S. 541), at page 549:

> "The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern."

The only difference between the facts in the *Estin* case, and those here presented is that here, the wife, a domiciliary of New York, had not had the opportunity to procure a judgment for alimony prior to the rendition of the Nevada *ex parte* divorce decree in favor of the husband. In conformity with a predetermined plan, petitioner went to Nevada to take advantage of its six-week residence statute, where he obtained his "quickie" divorce before respondent, domiciled in New York with a one-year residence requirement, could bring this action (Pltf.'s Ex. 22; R. 287).[3]

Mr. Justice Black, in his concurring opinion in *Armstrong* v. *Armstrong*, 350 U. S. 568, pointed out that the wife's right to support, unreduced to judgment, like Mrs. Estin's right to support after judgment, is the kind of personal right which cannot be adjudicated without personal jurisdiction having first been obtained over her. (See also *Hopson* v. *Hopson*, 224 Fed. (2d) 839, 844.)

There can be no distinction, in law or in reason, between a legal right, prior to judgment, and such right after judgment, in so far as concerns the protection thereof under the Due Process Clause of the Federal Constitution. Both are personal rights which cannot be altered, extinguished or divested without due process of law. Lacking *in personam* jurisdiction over respondent herein, the Nevada court could

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[3] Plaintiff's Exhibit 22 is a letter admittedly dictated by petitioner on December 6, 1952, before the commencement of the hearings in the prior separation action (R. 286-7).

not, by its *ex parte* judgment, constitutionally diminish or extinguish her personal right to maintenance.

In the *Armstrong* case, by its affirmance of the award of alimony by Ohio after the husband obtained a valid *ex parte* divorce in Florida, this entire Court was in agreement that an *ex parte* divorce decree, dissolving the marital relation, did not *ipso facto* extinguish the wife's right to maintenance.

Petitioner here argues, as the husband in the *Estin* case argued, that New York having recognized his constructive service divorce decree, no legal incidents of the marriage remained under New York law. The answer to that argument was given by this Court in the *Estin* case as follows (p. 544):

> "The difficulty with that argument is that the highest court in New York has held in this case that a support order can survive divorce and that this one has survived petitioner's divorce. That conclusion is binding upon us, except as it conflicts with the Full Faith and Credit Clause. It is not for us to say whether that ruling squares with what New York courts said on earlier occasions. It is enough that New York today says that such is her policy."

The question of enforcement of the support obligation unextinguished by a constructive service divorce decree obtained by the husband, is a matter of state policy which each state must decide for itself. It was so held by this Court in the *Estin* case. Respondent being a domiciliary of New York, that state, acting within the scope of its sovereign power to determine its own policy, had the power to preserve and enforce respondent's right to maintenance. The exercise of such power does not present a federal question reviewable by this Court.

Since the *Estin* case, New York's policy respecting the enforcement of the support obligation after an *ex parte* divorce, has been clearly reaffirmed by the New York Legislature in the enactment of Section 1170-b, C. P. A. and the opinion of the New York Court of Appeals interpreting that statute in this case.

The Statute.

The *Estin* case involved a wife who had procured a New York judgment for maintenance before the husband obtained his *ex parte* divorce decree. The Law Revision Commission of the State of New York in a desire to eliminate any doubt as to the New York policy respecting survival of the support obligation after an *ex parte* divorce, even though the wife *had not* obtained a decree for her maintenance prior to such divorce, recommended the enactment of Section 1170-b of the New York Civil Practice Act, stating in its report (Legislative Document (1953) No. 65 (K) (p. 467)):

> "A wife who has obtained in New York a separation order with maintenance provisions may enforce these provisions against her husband even though he may subsequently have obtained an *ex parte* foreign divorce entitled to recognition under the Full Faith and Credit Clause of the Constitution of the United States. Estin v. Estin, 334 U. S. 541, 58 Sup. Ct. 1213, 92 L. Ed. 1561 (1948). The husband's divorce must be recognized as altering the marital status of the parties under the second Williams case (Williams v. North Carolina, 325 U. S. 226, 65 Sup. Ct. 1118, 89 L. Ed. 1577 (1942)), but since the New York law was interpreted to permit a maintenance order in a separation action to survive a divorce, the prior maintenance order still prevails as far as the economic relations of the parties are concerned.
>
> "The Estin case called attention to the injustice to a New York wife whose husband has obtained a divorce in another state in an *ex parte* proceeding. Unless she had been able to get a separation order with maintenance prior to the foreign divorce, she has no remedy. Under the Civil Practice Act maintenance of the wife may be granted only as an incident to relief in a matrimonial action. Since 1883 it has been accepted law, moreover, that there is no inherent

power in the Supreme Court to grant maintenance to a wife independent of statutory authority. Ramsden v. Ramsden, 91 N. Y. 281 (1883)."

The report of the Law Revision Commission, quoted from *supra*, shows that one of the purposes of the enactment was to overcome the line of New York cases exemplified by *Ramsden* v. *Ramsden*, 91 N. Y. 281 (1883), holding that there is no inherent power in the New York court to grant maintenance to a wife unless she is successful in obtaining the principal relief in a separation or divorce action.

Long before the enactment of Section 1170-b, New York had declared its public policy to be that the obligation to maintain the wife survived the husband's successful prosecution of an *ex parte* divorce action and was enforceable (*Estin* v. *Estin*). In the *Estin* case, however, the procedural difficulties which would have confronted respondent (but for Sec. 1170-b) presented no obstacles, because Mrs. Estin had already obtained a judgment of separation with maintenance before her husband obtained his divorce; the court merely had to enforce an existing decree. Hence, until the enactment of Section 1170-b, the anomalous situation prevailed in New York where its public policy recognized the survival of the support obligation after an *ex parte* divorce, but there existed no procedural vehicle for the enforcement of the support obligation where the wife had no order or decree for support prior to the husband's *ex parte* divorce decree.

In enacting Section 1170-b, New York followed the path charted by this Court in its decision of the *Estin* case, where it declared that a constructive service divorce is not denied full faith and credit when post-divorce maintenance is awarded to a wife whose personal rights were not and could not be altered or divested *in absentia* in an *in rem* divorce proceeding.

Petitioner's citation of *Lynn* v. *Lynn*, 302 N. Y. 193, for the proposition that a Nevada decree was recognized in New York, as extinguishing the wife's right to support, is completely misleading because the facts in that case were mate-

rially different. The significant factual difference between the *Lynn* case, and the case at bar is, that in the *Lynn* case, the Nevada divorce judgment was one *in personam*, and was rendered in a divorce action in which the wife *appeared* and *defended*. Even though the New York Court of Appeals held that Mrs. Lynn's right to alimony was extinguished by the *in personam* Nevada divorce decree, nevertheless it reaffirmed its recognition and approval of the divisible divorce doctrine by making the following observations (p. 200):

> "The 'divisible divorce,' anomalous though it may at first appear, has become a recognized concept; it is now familiar law that a divorce decree may be completely effective to dissolve a marriage and yet completely ineffectual to alter certain legal and economic incidents of that marriage."

The allowance of maintenance to a wife after an *ex parte* divorce decree has been procured by the husband is neither revolutionary nor novel. The courts in many states, and as early as 1870, have granted such allowances under their general equity powers, notwithstanding the existence of a valid *ex parte* divorce decree previously rendered in favor of the husband (42 A. L. R. 1392, and cases there cited). New York, however, being procedurally circumscribed as to alimony without Section 1170-b, was unable to attain the results accomplished in other states, if there was no support order prior to the divorce decree.

Petitioner argues that the state of the matrimonial domicile has the power to extinguish the wife's personal right to support in a constructive service divorce action. In support of that argument petitioner rests upon *Thompson* v. *Thompson*, 226 U. S. 551. That decision is no longer the law today because it was based upon the rule in the case of *Haddock* v. *Haddock*, 201 U. S. 562, which was expressly overruled by this Court in *Williams* v. *North Carolina*, 317 U. S. 287, 304. The *Thompson* case rests upon the idea that the existence of the matrimonial domicile within a state confers jurisdic-

tional power upon the courts of that state to determine personal rights of an absent wife over whom no personal jurisdiction was acquired. This idea has been overturned by the *Estin* case, and the cases thereafter decided by this Court.[4] In any event any remaining doubt that the *Thompson* case, is no longer accepted law, is dispelled by the concurring opinion of Mr. Justice Black in *Armstrong* v. *Armstrong*, 350 U. S. 568, where it was stated:

> "To the extent that the Thompson decision can be considered as in any way inconsistent with Pennoyer v. Neff and Estin v. Estin, the Thompson case should no longer be considered to be the law."

In any event, even the outmoded and archaic concept of matrimonial domicile is not available to petitioner on the facts herein. California and not Nevada is the state in which the parties last resided together as husband and wife and, therefore, California and not Nevada is the matrimonial domicile. When petitioner abandoned respondent in California she established her separate domicile in New York, and one month later petitioner commenced his residence in Nevada (R. 96, 314-16). Respondent having thus established her legal separate domicile in New York, as such domiciliary, she became entitled to the benefits and protection of the laws of the State of New York and she became a subject of legitimate interest for that state.

Thus, if it be assumed that the Nevada court considered the question of alimony and decided that question adversely to respondent, nevertheless, that court lacked the jurisdictional power to adjudicate on that personal right of respondent and New York did not violate the Full Faith and Credit Clause by rendering its judgment awarding maintenance to respondent.

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[4] *Kreiger* v. *Kreiger*, 334 U. S. 555; *May* v. *Anderson*, 345 U. S. 528.

The Form of Action Authorized by Section 1170-b.

Petitioner criticizes Section 1170-b on the ground that it authorizes an action for a separation notwithstanding the fact that the husband may, in such action, interpose a defense of an *ex parte* divorce decree which may ultimately prove to be valid and a bar to the granting of a separation.

In making this criticism, petitioner overlooks the fact that until he establishes the existence of the divorce decree the New York court has no actual or constructive knowledge of its existence. Petitioner's Nevada divorce decree had no vitality in New York until it was made a judgment in New York. In *Williams* v. *North Carolina*, 325 U. S. 226, 229, this Court stated:

> "But the Clause does not make a sister-state judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia Convention. 2 Farrand, The Records of the Federal Convention of 1787, 447, 448. 'To give it the force of a judgment in another state, it must be made a judgment there.' McElmoyle v. Cohen, 13 Pet. 312, 325, 10 L. Ed. 177. It can be made a judgment there only if the court purporting to render the original judgment had power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction that is, to render the judgment."

In enacting Section 1170-b, the legislature authorized the courts, amongst other things, to grant maintenance even if the wife were unsuccessful in obtaining a separation or divorce by reason of the existence of a valid constructive service divorce decree obtained by the husband.

That statute sanctions an omnibus action in which all issues relating to separation, maintenance and the validity of the *ex parte* divorce may be litigated and in which relief

appropriate to the facts may be granted, thus avoiding a multiplicity of suits.

The legislature having the power to prescribe the means by which the husband's obligation to support his wife may be enforced, the particular *form* of action created by the legislature for that purpose is not a valid ground for criticism of the statute and no federal question is thereby presented. *Simon* v. *Craft*, 182 U. S. 427, 437; *Francis* v. *Resweber*, 329 U. S. 459.

In *Simon* v. *Craft*, *supra*, this Court stated at page 437:

> "But the due process clause of the Fourteenth Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceeding in which notice is given of the claim asserted and an opportunity afforded to defend against it. Louisville & Nashville Railroad Co. v. Schmidt, 177 U. S. 230, 236, and cases cited. If the essential requisites of full notice and opportunity to defend were present, this court will accept the interpretation given by the state court as to the regularity under the state statute of the practice pursued in the particular case."

It is of interest to note that in the *Armstrong* case, the wife was permitted to prosecute an action for a divorce in Ohio, notwithstanding the existence of the husband's prior Florida divorce decree. The Ohio court, in sustaining the husband's divorce, denied a divorce to the wife but made an award of alimony. On certiorari, this Court affirmed the Ohio judgment and did not strike it down despite the fact that the action in which the judgment was rendered in Ohio was in the *form* of an action for a divorce.

The New York Court of Appeals, by its affirmance of the judgment herein, has ruled that all proceedings herein are regular and that the judgment was duly rendered in accordance with state procedure.

It is fundamental that each state may determine for itself the form of action or remedy, the procedure for the commencement of actions, the limits of its jurisdiction and the character of actions and controversies which shall be heard in its courts.

Chambers v. *Baltimore & Ohio R. R.*, 207 U. S. 142;

Hardware Dealers Mutual Fire Insurance Co. v. *Glidden Co.*, 284 U. S. 151, 158;

Brown v. *Mississippi*, 297 U. S. 278, 285;

Louisville & Nashville Railroad Co. v. *Schmidt*, 177 U. S. 230, 236.

In *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U. S. 151, this Court stated at page 158:

> "* * * the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury nor guarantees any particular form or method of state procedure. See Missouri ex rel. Hurwitz v. North, 271 U. S. 40. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard."

Petitioner contends that Section 1170-b, contains a "command to deny full faith and credit to an out-of-state *ex parte* divorce decree." That statute makes no such direction. In fact, there is a tacit direction, implicit in that statute, that the court must deny the separation if the husband's *ex parte* divorce decree is presented to the court and is recognized as a valid decree.

Respondent's Right to Maintain This Action.

Petitioner contends that the Full Faith and Credit Clause was violated when respondent was permitted to maintain this action based upon a one-year residence in New York, which was commenced before petitioner's Nevada divorce decree was rendered, and completed thereafter.

When petitioner abandoned respondent in California, respondent went to New York, and, as an abandoned wife, she had the right to establish her separate domicile in New York. *Hunt* v. *Hunt*, 72 N. Y. 217, 242; *Dean* v. *Dean*, 241 N. Y. 240, 244; *Matter of Daggett*, 255 N. Y. 243, 247. Respondent exercised that right when she came to New York in February, 1953, which was several months before the Nevada divorce decree was rendered, and, in fact, one month before petitioner established his residence in Nevada (R. 41, 96, 341, 314-16; Deft.'s Ex. A; R. 31).

When respondent came to New York and established her separate domicile here she was the wife of petitioner and, as a New York domiciliary, she was endowed with all of the rights of a married woman conferred by the laws of the State of New York, including the right to maintenance. The Nevada *ex parte* divorce decree did not extinguish her personal right to maintenance, nor did it deprive her of her right to continue her New York domicile already established by her.

The fact that respondent had not completed her one-year residence in New York when the Nevada divorce decree was rendered did not result in the extinguishment of her right to support which she then had, it merely postponed the time for the enforcement of that right.

Respondent's right to maintain this action and her compliance with the residential requirements imposed by New York for its maintenance is a procedural matter which presents a state and not a federal question. This question already has been resolved below in favor of respondent by the court of last resort in New York as follows (343, 346):

"Plaintiff, having resided in this State for the required one-year period, had standing to bring such a suit and jurisdiction was effected by the sequestration of defendant's New York assets." (R. 543)

* * * * *

"That right she exercised in this instance before the Nevada judgment was entered and she satisfied New York's residence requirements before suing for a separation (Civ. Prac. Act, Sec. 1165-a)." (R. 546)

It is settled law that matters affecting procedure, practice and the remedy sought to be enforced are governed by state law, and a decision of the state court on those matters is not reviewable by this Court and does not present a federal question. *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507; *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.*, 284 U. S. 151, 158. *Simon* v. *Craft*, 182 U. S. 427, 436-7.

Petitioner expresses concern that Section 1170-b will create problems for New York by encouraging wives to come to New York to take advantage of that statute in obtaining support. Such fears have not been shared by the legislature or the courts of New York in the enactment of the statute and in making and affirming the judgment herein. In any event such fears are ill-founded because no action could be brought there by the wife unless the husband or his property can be found in New York, otherwise New York would lack jurisdiction to make any money award. Therefore, it is the husband who would attract his abandoned wife to the State of New York, either by his presence within the state or by having brought his property there.

Moreover, the problem of attraction of migratory litigants presents a state rather than a federal question. The legislature and the highest court in New York have left no doubt as to the policy of New York on this score.

Res Judicata as to Misconduct.

Petitioner urges that the finding of the Nevada court was res judicata on the issue of marital misconduct and precluded the New York court from finding that petitioner was guilty of such misconduct, and he suggests that in doing so New York has denied full faith and credit to the Nevada decree.

The determination of misconduct was made by the Nevada court in an *in rem* divorce proceeding which involved the marital status only.

In this action the findings that petitioner was guilty of misconduct were made in connection with the court's inquiry as to whether respondent was entitled to an award of alimony within the purview of the phrase "as justice may require" contained in Section 1170-b.

The authorities uniformly hold that whatever facts are found in an action *in rem* are limited to the *res* before the court and are not binding upon the absent litigant in any subsequent litigation not involving the *res*. Therefore, any finding of fact on marital misconduct made in the Nevada *in rem* proceeding with respect to the marital status only, cannot be binding upon respondent in this action and is not *res judicata* of such issues on matters not involving status.

Baker v. *Baker, Eccles & Co.*, 242 U. S. 394, 401, 403;

Riley v. *N. Y. Trust Co.*, 315 U. S. 343;

Freeman On Judgments (5th Ed.) Sec. 1524;

Restatement of the Law of Judgments, Secs. 73-74 (American Law Institute);

Durant v. *Abendroth*, 97 N. Y. 132, 141;

Maynicke v. *Maynicke*, 274 N. Y. S. 864, 870, 152 Misc. 727;

Thurston v. *Thurston*, 58 Minn. 279, 59 N. W. 1017;

28 A. L. R. 2d 1391, and cases there cited.

We quote from Section 74 of the Restatement of the Law on Judgments (American Law Institute), as follows:

> "c. *Effect of judgment on other causes of action.* Although a valid judgment *in rem* is binding on all the world as to the existence of a status which is the subject of the action, it is not conclusive as to a fact upon which the judgment is based in any subsequent action (not involving the existence of the status) except as to persons who have appeared and actually litigated the question of the existence of the fact."

There Has Been No Violation of the Constitutional Prohibition Against the Impairment of Contracts.

Petitioner argues obscurely that Section 1170-b unconstitutionally imposed a post-marital burden upon petitioner which did not exist before, and cites the provisions of the Federal Constitution which prohibit the passage of any law impairing the obligation of contracts (Art. I, Section 10). This Court has held in *Maynard* v. *Hill*, 125 U. S. 190, that those provisions of the Federal Constitution have no application to the marriage relation.

Nevada Did Not Adjudicate on the Subject of Alimony.

Under the Nevada statute (Section 9463, Nevada Compiled Laws)[5] alimony may be awarded to a wife without regard to marital fault. *Lewis* v. *Lewis*, 289 P. 2d 416 (1955). That statute contemplates that, in making a determination to grant or deny alimony, the court shall make inquiry as to the existence of property of either spouse and to make an investigation thereof with a view to make such adjustment as shall be equitable between the parties under all circumstances of the particular case. *Buaas* v. *Buaas*, 62 Nev. 232, 147 P. 2d 495.

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[5] See Appendix, page 38.

The judgment roll in petitioner's Nevada divorce action which is Defendant's Exhibit A herein (R. 31), includes the summons and complaint, the testimony, findings and the decree. That record shows that petitioner did not seek a denial of alimony in his complaint; there was no testimony adduced at the trial with respect to the financial means of the parties, their respective needs, or any other matter relevant to the issue of granting or denying alimony to the wife. The findings and decree make no reference to alimony, its grant or denial.

In view of the requirements of the Nevada statute, and the state of the record of the divorce proceedings there, it is evident that the Nevada court did not consider or decide either a grant or denial of alimony to the wife.

The fact that the Nevada court refrained from considering or adjudicating upon the subject of alimony is consistent with the pronouncements of this Court in *Estin* v. *Estin*, 334 U. S. 541; and *Kreiger* v. *Kreiger*, 334 U. S. 555, that a court has no power to adjudicate upon the personal right of the wife to alimony in an action *in rem* where jurisdiction of her person has not been obtained.

It is reasonable to presume that Nevada would not violate the rule established by this Court in those cases, and the record of the Nevada divorce action fully supports this presumption.

In the absence of an adjudication by Nevada on the subject of alimony, New York, in any event, was not foreclosed and was free to decide the question of alimony in the instant case without conflicting with any adjudication by the Nevada court. Hence, the award of alimony by the New York court presents no question under the Full Faith and Credit Clause. *Armstrong* v. *Armstrong*, 350 U. S. 568.

POINT II

SECTION 1170-b APPLIES WITH EQUAL EFFECT TO EX PARTE DIVORCE DECREES OBTAINED IN NEW YORK AS WELL AS IN OTHER STATES.

Petitioner erroneously argues that section 1170-b, is discriminatory. That argument is based upon the false premise that the statute does not apply to New York *ex parte* divorce decrees.

The New York Law Revision Commission[6] proposed the enactment of 1170-b, and pointed out in its report that it drafted the statute with special regard to avoid any possible claim of discrimination so that it would apply with equal effect to all *ex parte* divorce decrees, whether obtained in New York or elsewhere. We quote from that report (p. 468):

> "In order to avoid discrimination against foreign divorces, against which the Estin opinion warned, such legislation should be made applicable whether the husband's *ex parte* adjudication of marital status was obtained in a foreign court or a New York court."

Section 1170-b (Pet.'s Br., p. 4) was enacted in the form proposed by the Law Revision Commission, and by its terms makes no distinction between *ex parte* divorces obtained in New York and those rendered elsewhere.

Petitioner's claim of discrimination was rejected by the Court of Appeals which interpreted the statute as having no discriminatory intention or effect, that Court stating as follows (R. 546-7):

> "Defendant assumes that New York would not enforce its Section 1170-b as against a prior non-personal New York divorce judgment, and then goes on to assume

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[6] Report of N. Y. Law Revision Commission, Legis. Doc. (1953) No. 65(K) (p. 467).

> that New York's suppositious refusal to apply Section 1170-b as against one of its own New York judgments would mean that New York would be giving a foreign judgment less protection than a local judgment as against Section 1170-b. As to defendant's first assumption there is nothing in our statute to support the conclusion that it is inapplicable where the prior judgment was obtained in New York (the Law Revision Commission report and recommendation certainly make no such distinction, but instead recommends applicability 'whether the husband's *ex parte* adjudication of marital status was obtained in a foreign or a New York court.' P. 468)."

Petitioner's contention that the statute is discriminatory is therefore completely refuted by the legislative intent as revealed by the Report of the Law Revision Commission, the clear language of the statute itself, and the unequivocal interpretation of that statute by the New York Court of Appeals in this case.

The Sequestration.

The record does not support petitioner's argument that the sequestration of his property was discriminatory. This argument is based upon another false premise that a husband residing in New York would not have been subjected to the sequestration of his property. From this he concludes that the sequestration was discriminatory.

Section 1171-a, New York Civil Practice Act (Pet.'s Br. App., p. 2A) authorizing sequestration of the husband's property within New York, does not make any distinction between husbands who are residents of the state and those who are not; the criterion is, whether he can be found within the state and be served personally with process. Of course, in the case of a husband resident in New York and amenable to personal service of process within the state, there would be no necessity for publication or sequestration to confer

jurisdiction to render a judgment and to make an award for maintenance. Therefore, there has been no discrimination against petitioner in the granting of sequestration.

Moreover, it is not discriminatory for a state to distinguish between residents and nonresidents with respect to attachment or sequestration of property within the state. *Central Loan and Trust Co.* v. *Campbell Commission Co.*, 173 U. S. 84.

The sequestration was properly granted in this case because Section 1170-b, C. P. A., authorized respondent to maintain an action for separation, and Section 1171-a, C. P. A., permits sequestration in such an action. Sequestration was granted as a proper exercise of the discretion of the court based on papers, the sufficiency of which was never attacked.

The Court of Appeals, by its affirmance of the judgment herein, has conclusively established the propriety and regularity of the sequestration proceedings and no federal question is presented on this issue.

Petitioner, in arguing the question of discrimination, and elsewhere throughout his brief, has employed the technique of challenging Section 1170-b, the judgment herein and the opinion of the Court of Appeals by references to earlier New York decisions which have become obsolete by the enactment of Section 1170-b and the decision of the Court of Appeals in this case. This court in the *Estin* case, rejected that technique. It is fundamental that this Court will accept the pronouncements of the highest court of the state as to what the state law is. The interest of this Court is aroused only in the application of the test of constitutionality under the Federal Constitution to the decisional or statutory law of the state as pronounced or interpreted by the highest court of the state.

Concededly Section 1170-b and the opinion rendered below have accomplished some changes in the law of New York as it existed prior to that enactment and the decision herein (R. 547). However, no one can deny the power of the New York Legislature and the New York Court of Appeals to make such changes, provided no constitutional provisions

have been violated thereby. Therefore there is no necessity for answering any of the petitioner's arguments which relate to the claims of inconsistency between the older New York authorities and Section 1170-b and its application in this case.

POINT III

THERE WAS NO DENIAL OF DUE PROCESS.

Petitioner's claims of lack of due process are frivolous and present no federal question.

Petitioner had Adequate Notice and Opportunity to Defend the Action.

Petitioner raises objections to the complaint with respect to the sufficiency of notice of respondent's claim herein. The complaint fully apprised petitioner as to what respondent was seeking. The complaint showed that the petitioner had committed acts of cruelty and misconduct and that he abandoned respondent; that he had substantial wealth and income and made no provision for the support of respondent. The relief sought in the complaint was for a separation, an award for maintenance out of the property and income of petitioner, and such other and further relief as to the court may seem just and proper (R. 12).

The New York Civil Practice Act has adequate provisions pursuant to which petitioner could have obtained any additional particulars which he considered necessary. As early as June 1956, before answer, on his motion to dismiss the complaint on jurisdictional grounds, petitioner was apprised of respondent's attack upon the validity of his Nevada decree and of respondent's reliance on Section 1170-b for an award of maintenance, if her separation should be barred by a finding of validity of petitioner's decree. The opinion denying that motion confirms those facts. *Vanderbilt* v. *Vanderbilt*, 133 N. Y. S. (2d) 314.

The Court of Appeals, in rejecting that claim as lacking in merit, stated (R. 548):

> "Similarly without substance is defendant's statement that he was given no notice by pleading or otherwise, in this suit brought ostensibly for a separation, that even if no separation were to be granted, an award for maintenance might still be in the offing. Adequate notice was given by the statute itself which warned that if a separation should be refused because of the foreign divorce judgment, maintenance might still be awarded."

Service by publication effectively gave notice to petitioner of the commencement of this action and afforded him an opportunity to defend. Additional effective notice was given to petitioner by the sequestration and seizure of his property in New York. *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306; *Mathews* v. *Mathews*, 247 N. Y. 32; *Geary* v. *Geary*, 272 N. Y. 390.

Throughout this protracted litigation petitioner has availed himself of all the benefits and devices under the law in an endeavor to avoid the fulfillment of his obligation to support respondent. However, at no time has petitioner attacked the sufficiency of the papers and documents upon which the orders of publication and sequestration were based, or the manner of respondent's compliance with said orders.

Not only did petitioner have an opportunity to defend, but he availed himself of that opportunity most vigorously and abundantly. Nine days after the order for publication and sequestration was signed he appeared specially (R. 17). Then he unsuccessfully moved to dismiss the complaint on jurisdictional grounds and, on July 1, 1954, he served his answer and tendered his Nevada *ex parte* divorce decree as a defense to the action herein (R. 18). Thereafter he participated on the merits or pre-trial motions and appeals (R. 27; *Vanderbilt* v. *Vanderbilt*, 284 App. Div. 949, 135 N. Y. S. 2d 622 (2 appeals); *Vanderbilt* v. *Vanderbilt*, 133 N. Y. S. 2d 314, (not officially reported)).

The record of the protracted seven day trial shows that there can be no question that petitioner was afforded an opportunity to be heard and that he took advantage of that opportunity by vigorously participating in a contest on the merits of every issue presented at the trial. His participation at the trial included, among other things, numerous objections, tactical motions and extensive cross-examination of respondent on all aspects of her direct testimony including the issue of misconduct. Petitioner's counsel also introduced affirmative evidence in support of his defenses and in rebuttal of respondent's evidence on the subject of petitioner's finances and income (R. 312, 456, 482, 484, 492).

As a result of his efforts petitioner was successful in obtaining recognition of the validity of his Nevada decree and in keeping to a low figure the amount allowed to respondent for her maintenance.

Petitioner having been afforded a full opportunity to present his evidence and arguments and having availed himself of that opportunity, he cannot be heard to challenge the judgment as having been rendered without due process of law.

In appealing from only part of the judgment, petitioner has accepted the benefits of the judgment herein which recognizes his Nevada decree. However, he attacks the balance of the judgment, claiming a denial of due process of law. *By accepting the benefits of the judgment, petitioner has, in any event, precluded himself from now contending that the judgment was rendered without due process of law. Laing v. Rigney*, 160 U. S. 531.

Petitioner Was Not Denied a Fair Trial.

Petitioner's recital of what happened upon the trial, in an endeavor to sustain his spurious claim of an unfair trial, is deceptive. That recital consists of references to the record, taken out of context, and he omits pertinent portions of the record which dispel any possible claim that petitioner did not have a full and complete opportunity to present whatever evidence he wanted the court to consider.

The nub of the contention with respect to petitioner's claim of denial of a fair trial is, that the trial court had ruled that it would strike out the testimony with respect to petitioner's misconduct. The basis of that claim is a colloquy between the court and petitioner's counsel at the commencement of the trial (R. 39). The evidence with respect to misconduct was thereafter received by the court and no motion was made by petitioner's attorney to strike it out and *that testimony was not stricken out.* That colloquy was preceded by a discussion initiated by petitioner's attorney as to whether the evidence of petitioner's misconduct should be excluded on the ground that the Nevada decree was *res judicata* on that issue. During that discussion respondent's counsel delivered to the trial court a memorandum of law showing that the Nevada *ex parte* divorce decree was not *res judicata* on the subject of misconduct, and that the trial court was not precluded from receiving evidence on that issue (R. 33). Thereafter the trial court did receive that testimony, overruling the repeated objections of petitioner's counsel to the introduction thereof (R. 62, 69, 91, 92, 102, 103, 106); the trial court evidently having concluded that that testimony was admissible and that its introduction into evidence was not precluded by the Nevada *ex parte* decree.

Petitioner also claims that he was precluded from introducing evidence relating to the issue of misconduct, contending that the complaint was dismissed on the merits. He refers to page 349 of the record in support of that claim. The record shows that the complaint was not dismissed in its entirety. The trial court clearly stated that it dismissed only that part of the complaint bearing on the relief of separation and was continuing the case with respect to the issue of maintenance.

Therefore there is no justification for petitioner's contention that the evidence relating to petitioner's misconduct was eliminated from the case. That is confirmed by the remarks

of the trial court upon the partial dismissal of the complaint (R. 344-6, 349-50).[7]

The trial court afforded petitioner's attorney the widest latitude to meet the evidence adduced by respondent.[8]

Petitioner's attorney's omission to present evidence to controvert respondent's charges of misconduct was deliberate and intentional, and there was no ruling by the trial court limiting or excluding any offered proof with respect thereto.

Petitioner's attorney showed throughout the trial that he had no intention of calling the petitioner or anyone else to refute respondent's evidence as to misconduct. The record clearly showed that he relied upon the theory of estoppel, claiming that the Nevada divorce decree was *res judicata* on the issues of petitioner's misconduct (R. 35-6) and he now continues to make such contentions in his brief.

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[7] R. 345:

"Mr. Winsten: Then it is my understanding from your Honor's ruling that the complaint is not dismissed in its entirety. The Court has merely denied the relief of separation, but is entertaining the action and the complaint in so far as it requests support and maintenance?"

"The Court: If there is any question about it, that is exactly what I mean. I said I am continuing the case, but that part of the complaint is dismissed."

[8] R. 345:

"But in so far as the balance of the relief requested, I indicated in the last part of my decision that I am continuing this case in order to take the testimony as to the income, resources *and other necessary information in connection with the claim of maintenance and support under 1170-b.*" (Emphasis supplied.)

R. 350:

"I must first listen to the testimony of the plaintiff who claims that she is entitled to maintenance and support, and let her tell us what she considers necessary for her maintenance and support. *Then you come in and make your argument, or cross-examine her, or submit what you think the law requires or does not require.*" (Emphasis supplied.)

At the *outset* of the trial petitioner's counsel informed the Court as follows:

> "The defendant is not here and does not propose to be here, your Honor." (R. 26)

The record is barren of any attempt on the part of petitioner's counsel to introduce any evidence to refute respondent's charges of petitioner's misconduct.

In any event, both appellate courts below have rejected petitioner's claims that he was precluded from offering such evidence and that he was denied a fair trial. We quote from the opinion of the Appellate Division:

> "On this appeal the husband contends that he had no opportunity to meet these issues, but that is not so. The trial court clearly indicated that after it would decide the motion to dismiss at the close of the wife's case, the husband could meet any issues that he considered relevant." (R. 530 n).

We quote from the opinion of the Court of Appeals:

> "Other charges by defendant of deprivation of due process are without merit. He complains that he was denied a fair opportunity to present proof as to alimony but the record does not bear him out." (R. 548)

This court has held that where a litigant has failed to make any offer of proof with respect to any issue, his alleged misapprehension as to the effect of evidence in the record upon his rights does not constitute a denial of constitutional rights. *Market St. R. Co.* v. *Railroad Commission*, 324 U. S. 548, 559. In that case this Court stated as follows at page 559:

> "But even if a more convincing showing were made that the company had relevant evidence to be heard, we find no adequate excuse for the failure to offer it in the proceeding. No offer was rejected, no request for time to obtain such evidence was denied. A mis-

> apprehension by a litigant of the steps which its best interest require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights."

The Phrase "As Justice May Require" in Section 1170-b Is Not Vague.

The complete answer to petitioner's complaint of vagueness is the interpretation of that phrase by the Court of Appeals herein as follows (R. 548):

> "He complains as to the vagueness of the phrase in section 1170-b, 'as justice may require.' But that same phrase has been for many years in section 1170 of the Civil Practice Act with respect to questions of custody of children and temporary and permanent alimony in separation and divorce suits. It means (see as used in Election Law, § 330) that there are no 'as matter of law' requirements one way or the other as to those matters which are to be dealt with in the discretion of the courts, on all the facts."

The New York Court of Appeals thus has defined that phrase as meaning that the question of alimony is one to be determined by the court in the exercise of its sound discretion upon all the facts and circumstances in each case. Fundamentally the allowance of alimony and the amount thereof involves the exercise of the discretion of the court and depends upon the justice and equities in any particular case, subject to any restriction upon that discretion expressly set forth in that statute.

Petitioner attempts to support his claim of vagueness by reliance on the decision in *Connally* v. *General Construction Co.*, 269 U. S. 385, 391. That case does not support his contention that Section 1170-b is vague and unconstitutional. It dealt with a penal statute, and the question there involved was whether the accused was sufficiently apprised as to what

he was *prohibited* from doing. The rule enunciated in that case with respect to the determination of certainty of legislative enactments as applied to Section 1170-b shows clearly that there can be no challenge for vagueness here. This Court stated at page 391:

> "But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502; Omaechevarria v. Idaho, 246 U. S. 343, 348, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, Nash v. United States 229 U. S. 373, 376; International Harvester Co. v. Kentucky, supra, p. 223, or, as broadly stated by *Mr. Chief Justice White* in United States v. Cohen Grocery Co., 225 U. S. 81, 92 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded'."

The phrase "as justice may require" is a special or technical expression which is also found in Sections 1155 and 1170 of the New York Civil Practice Act (App. p. 37), and for many years it has been the sole standard applied in New York for the allowance of alimony generally in every divorce and separation action brought in New York. Through the years of its existence on the New York statute books, the phrase has been interpreted and applied without question or difficulty. Its meaning is well-known, and it has attained the significance of a phrase of legal art with respect to alimony in matrimonial actions.

The incorporation of the phrase "as justice may require" in Section 1170-b, is evidence of the legislative intent to vest

in the courts, in the application of that statute, the same discretionary powers theretofore vested in the courts with respect to alimony in every other matrimonial action brought in that state. Section 1170-b, therefore, contains no new or unusual standard, nor is the traditional and time-tested standard incorporated therein, vague or unconstitutional.

CONCLUSION

THE JUDGMENT DATED MARCH 30, 1955, AND ENTERED IN THE NEW YORK COUNTY CLERK'S OFFICE ON MARCH 31, 1955, AS THEREAFTER AFFIRMED BY THE NEW YORK COURT OF APPEALS ON MAY 31, 1956, SHOULD BE AFFIRMED.

Dated, March 29, 1957.

Respectfully submitted,

MONROE J. WINSTEN,
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MONROE J. WINSTEN,
CHARLES L. RASKIN,
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APPENDIX.

New York Civil Practice Act.

§ 1155. Maintenance and support of wife and children in action for divorce by wife.

The court, in the final judgment dissolving the marriage in an action for divorce brought by the wife, may require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, *as justice requires*, having regard to the circumstances of the respective parties; and, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe at any time after final judgment whether heretofore or hereafter rendered, may annul, vary or modify such a direction. * * * (Emphasis supplied.)

§ 1170. Custody and maintenance of children, and support of plaintiff in action for divorce or separation.

Where an action for divorce or separation is brought by either husband or wife, the court, except as otherwise expressly prescribed by statute, must give, either in the final judgment, or by one or more orders, made from time to time before final judgment, such directions *as justice requires*, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court, by order, upon the application of either party to the action, or any other person or party having the care, custody and control of said child or children pursuant to said final judgment or order, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, may annul, vary or modify such directions, or in case no such direction or directions shall have been made, amend it by inserting such direction or directions *as justice requires* for the custody, care, education and maintenance of any such child or children or for the support of the plaintiff in such final judgment or order or orders. * * * (Emphasis supplied.)

§ 9463. Disposition of Property, What Considerations Determine—Effect of Decree on Matters Not Specifically Mentioned—Preliminary Restraining Orders. § 25. In granting a divorce, the court may award such alimony to the wife and shall make such disposition of the community property of the parties as shall appear just and equitable, having regard to the respective merits of the parties and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens, if any, imposed upon it, for the benefit of the children. The court may also set apart such portion of the husband's property for the wife's support and the support of their children as shall be deemed just and equitable. In the event of the death of either party or the subsequent remarriage of the wife all alimony awarded by the decree shall cease, unless it shall have been otherwise ordered by the court. In the event alimony has been awarded to the wife, or the court otherwise adjudicates the property rights of the parties, or an agreement by the parties settling their property rights has been approved by the court, whether or not the court has retained jurisdiction to modify the same, such alimony so awarded, such adjudication of property rights, and such agreements settling property rights, may nevertheless at any time thereafter be modified by the court upon written stipulation duly signed and acknowledged by the parties to such action, and in accordance with the terms thereof. If after the filing of the complaint, it shall be made to appear probable to the court or the judge in action, that either party is about to do any act that would defeat or render less effectual any order which the court might ultimately make concerning the property or pecuniary interests, an order shall be made for the prevention thereof, to be enforced as such preliminary orders are enforced respecting children.